FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

The United States of America, Plaintiff,
vs.
The State of Oregon, Defendant.
} Original No. 13

REPORT OF THE SPECIAL MASTER

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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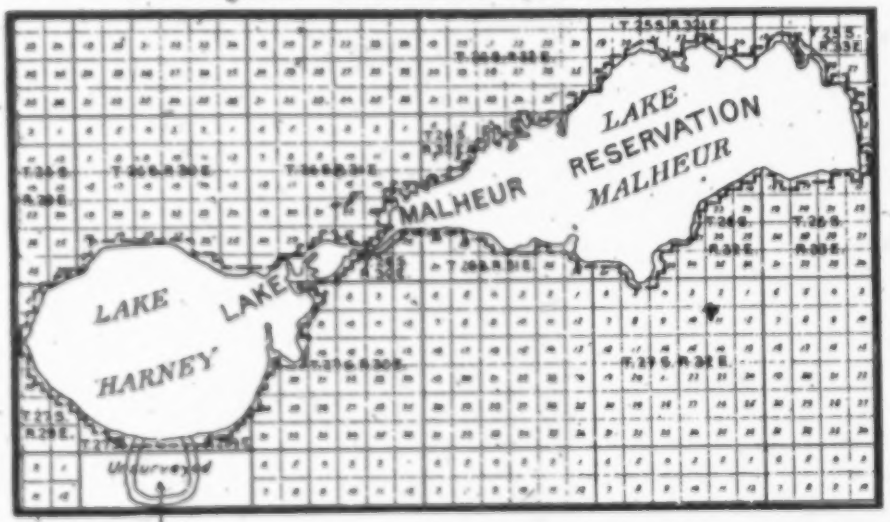
THE UNITED STATES OF AMERICA v. THE STATE OF OREGON.
Exhibit B to Bill of Complaint
With Addition Indicated Below.

LAKE MALHEUR RESERVATION

OREGON

Embracing all least subdivisions touching the shore lines of Lakes Malheur and Harney and their connecting waters in Tps. 25 S. Rgs. 32, 32½ and 33, Tps. 26 S. Rgs. 29, 30, 31, 32 and 33, and Tps. 27 S. Rgs. 29, 29½, 30 and 32 all east of Willamette Meridian, Oregon, segregated by broken line and designated "Lake Malheur Reservation"



The addition (indicated by a double line not drawn to scale) to the meander line of Harney Lake which crosses and recrosses the boundary of Lake Malheur Reservation embraces 115.92 acres in T. 27 S. R. 29¾ E. (surveyed in 1912) and is added by the Special Master to show the fact.

Executive Order.

It is hereby ordered that all smallest legal subdivisions which touch the shore line of Lakes Malheur and Harney and the streams and waters connecting these lakes in township twenty-five south, ranges thirty-two, thirty-two and one-half and thirty-three; township twenty-six south, ranges twenty-nine, thirty, thirty-one, thirty-two and thirty-three; township twenty-seven south, ranges twenty-nine, twenty-nine and one-half, thirty and thirty-two, all east of the Willamette Meridian, Oregon, together with all islands and unsurveyed lands situated within the meander lines of said lakes and connecting waters, as segregated by the broken line shown upon the diagram hereto attached and made a part of this Order, are hereby reserved, subject to valid existing rights, and set aside for the use of the Department of Agriculture as a preserve and breeding ground for native birds. The taking or destruction of birds' eggs and nests, and the taking or killing of any species of native bird for any purpose whatsoever, except under such rules and regulations as may be prescribed by the Secretary of Agriculture, is prohibited, and warning is expressly given to all persons not to commit within the reserved territory any of the acts hereby enjoined. This reserve to be known as Lake Malheur Reservation.

THEODORE ROOSEVELT

THE WHITE HOUSE,
August 18, 1908.

[No. 929.]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

The United States of America, Plaintiff,
vs.
The State of Oregon, Defendant.
} Original No. 13

REPORT OF THE SPECIAL MASTER

To the Supreme Court of the United States.

In this suit (begun December 1, 1930) the United States seeks to quiet title against the State of Oregon alone[1] to "a large tract of lake-bed land, known as Malheur and Harney Lakes; including a small strip of land constituting a connecting channel between said lakes, and known as Mud Lake and the Narrows", which the surveys show embraces 81,786 acres of unsurveyed lands in Harney County, Oregon, included within a meander line 105.36 miles in length. The Bill of Complaint does not describe the area by courses and distances, nor state the acreage involved, but speaks as just noted of "a large tract of lake bed land" etc. (Bill of Complaint, Par. I); which the defendant says is and should be called "the bed of said lakes underneath the waters thereof up to ordinary high-water line". (Amended Answer, Par. I.)

These terms are used herein interchangeably to indicate land underlying water up to said line of ordinary or mean high-water.

The State of Oregon was admitted into the Union on February 14, 1859. On that day the area within the

1. "Under the Constitution our original jurisdiction extends to suits by one state against another, and to suits by the United States against a state." (citing cases) *Oklahoma v. Texas*, 258 U. S. 574, 581; and "an individual citizen may be made a party where relief is properly sought as against him." *Kentucky v. Indiana*, 281 U. S. 163, 173 ft.

meander line was public domain of the United States and no part thereof has ever been disposed of (in terms) by the United States. The case turns upon whether (a) the area involved passed to the State of Oregon upon its admission into the Union as land underlying navigable waters,[2] and (b) if not, whether the United States has lost title through disposition of the uplands bordering thereon[3] by (1) patent and (2) statutory grant of school and indemnity lands in the Act admitting Oregon into the Union (see *United States v. Morrison,* 240 U. S. 192 [1916]). In addition, questions arise respecting the scope of a proper decree herein due (a) to the absence of persons interested in the subject-matter; and (b) the possibility that the United States had at the commencement of the suit lost title to some but not all of the area involved. In this connection, read message of the President dated June 6, 1930, vetoing an act designed to provide for a suit in the District Court for Oregon to determine the respective rights

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2. See United States v. Utah, 283 U. S. 64, 75; United States v. Holt State Bank, 270 U. S. 49, 55; Oklahoma v. Texas, 258 U. S. 574, 583; Brewer Oil Company v. United States, 260 U. S. 77, 83; Shively v. Bowlby, 152 U. S. 1, 14-15, 26. See also: United States v. Ladley (State of Idaho, Intervener) (D. Ct. Idaho, 1933, Cavanah, D. J.), 4 Fed. Supp. 580.

3. *Hardin v. Jordan,* 140 U. S. 371 (1891), held that (a) according to the common law (p. 388, line 11, p. 396, line 16) the grantee of upland under a patent of the United States **in particular form** (p. 380, line 14, p. 384 near ft.) took to the center of the lake rateably with other riparian proprietors (p. 402, lines 4-9), if there were such; and (b) the rule at common law thus stated prevailed in Illinois (p. 384 ft., p. 388, line 6).

Two years later, *Lamprey v. Metcalf,* 52 Minn. 181, 53 N. W. 1139 (1893), attributed to Hardin v. Jordan, 140 U. S. 371 (1891), and its companion case, Mitchell v. Smale, 140 U. S. 406 (1891), a holding seemingly not to be found therein, saying (52 Minn. 192, 53 N. W. 1140, c. 2):

> "Grants by the United States of its public lands bounded on streams or other waters, made without reservation or restriction, are to be construed according to the law of the state in which the lands lie; and, **consequently,** whether the land forming the beds of these lakes belongs to the state, or to the owners of the riparian lands, is a question to be determined entirely by the laws of Minnesota. In support of these propositions, we need only cite Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. Rep. 808, 838, and Mitchell v. Smale, 140 U. S. 406, 11 Sup. Ct. Rep. 819, 840."

Three years thereafter *Fuller v. Shedd,* 161 Ill. 462, 482, last three lines to 490, line 18, 44 N. E. 286, 293, c. 1, line 35 to 295, c. 2, line 52 (1896), (a) held, contrary to *Hardin v. Jordan,* that under Illinois law "a grant

of all persons interested in the lands here involved (Supplement, infra, page iii), following which (eighteen months afterwards) this suit was brought.

In the 81,786 acres of unsurveyed lands above mentioned are three lakes (a) Malheur Lake (47,670.40 acres); (b) Mud Lake (1466 acres); and (c) Harney Lake (29,562 acres). During most of each year from 1918 to 1931, except the years 1921, 1922 and 1928, the recession of the waters of Malheur Lake was practically complete, and from years prior to the commencement of suit Harney Lake has been substantially dry (Finding XX, infra). Harney Lake is "a sump for the evaporation of waters . . . from Malheur and Mud Lakes . . . and all the lands inside the meander line of Harney Lake are substantially worthless" (Amended Answer, Counterclaim, Paragraph V, page 44).

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of land bounded on a meander line conveys only to the water's edge, with riparian rights, but does not include land under the water"; and (b) in effect held but not explicitly that upon such a grant being made by the United States the bed of the lake passed to the State of Illinois.

Hammond v. Shepard, 186 Ill. 235, 241 top, 57 N. E. 867, c. 2 (1900), held that "shore owners on meandered lakes, whether navigable or non-navigable, take title only to the water's edge, the bed of the lake being in the state".

Hardin v. Shedd, 190 U. S. 508, 519 foot (1903), accepted the law of Illinois as thus settled, declaring "that conveyances of the upland do not carry adjoining land below the water line", but did not pass upon (and the case on error to this Court did not involve) the question whether such a conveyance being made, title to the bed remained in the United States or passed to the state.

Speaking for the Court, Mr. Justice Holmes said (p. 519):

> "When land is conveyed by the United States bounded on a non-navigable lake belonging to it, the grounds for the decision must be quite different from the considerations affecting a conveyance of land bounded on navigable water. In the latter case the land under the water does not belong to the United States, but has passed to the State by its admission to the Union. Nevertheless it has become established almost without argument that in the former case as in the latter the effect of the grant on the title to adjoining submerged land will be determined by the law of the State where the land lies. In the case of land bounded on a non-navigable lake the United States assumes the position of a private owner subject to the general law of the State, so far as its conveyances are concerned. * * * When land under navigable water passes to the riparian proprietor, along with the grant of

Malheur and Mud Lakes are connected by the Narrows which may be described as a waterway having somewhat the configuration of a stream. The length of the Narrows is 2.12 miles and its average width 17.4 chains; it is narrowest at the Bridge (a point well known locally) where the width is 7.0 chains, and it is widest at the point where Malheur empties therein, where the width is 32.8 chains. The area of the Narrows is 295.60 acres.

Mud and Harney Lakes are connected by an area of sand, a reef whereon furnishes its name (the Sand Reef). A water course through the Sand Reef and overflow thereon take the upper waters into Harney Lake through a cut or rift. The area of and about the Sand Reef is 2792 acres.

The waters within the above 81,786 acres are wholly inland, have no outlet and are intrastate.

Throughout this Report, including the Findings, Conclusions of Law, and recommended form of Decree,

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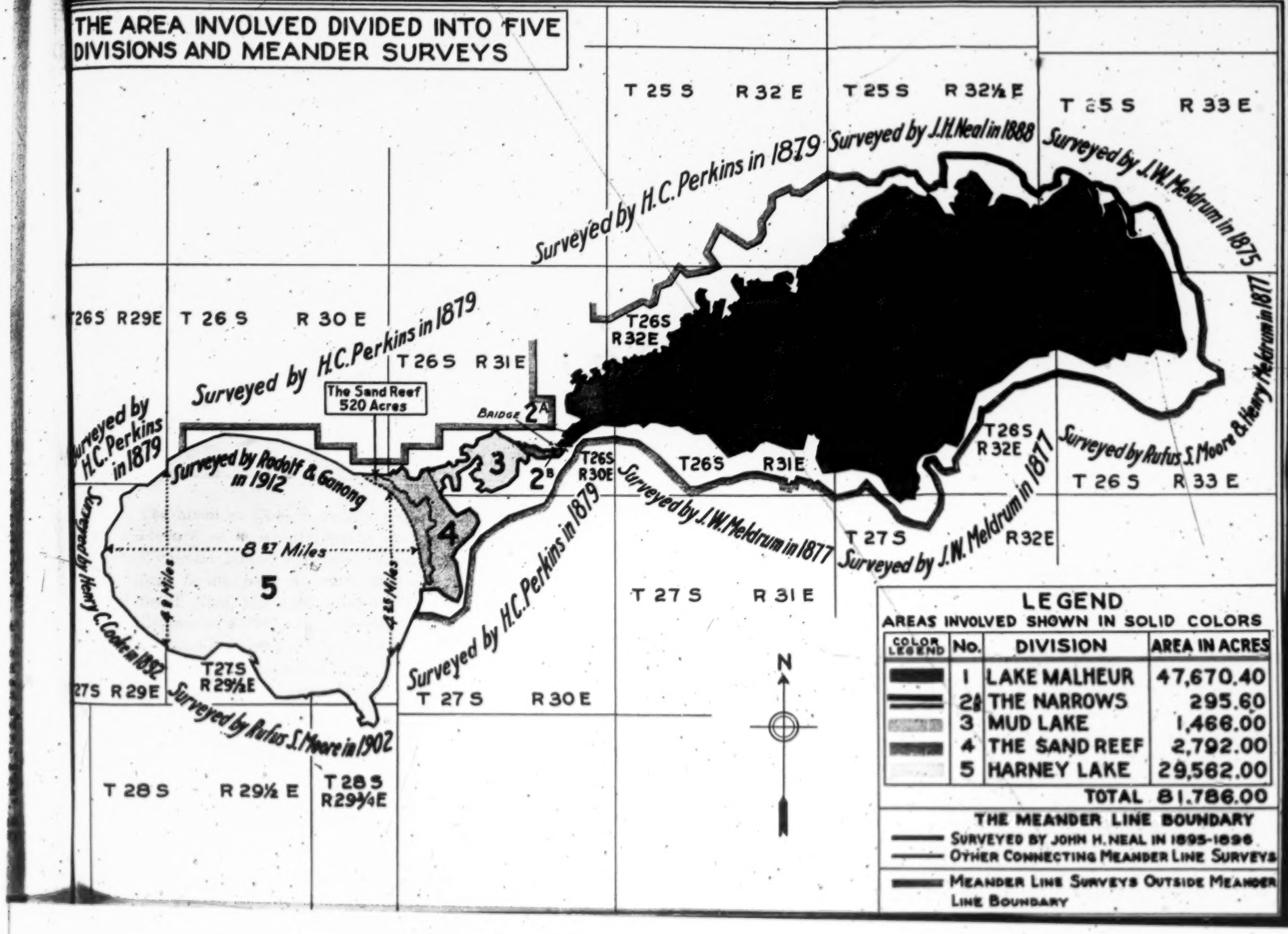
the shore by the United States, it does not pass by force of the grant alone, because the United States does not own it, but it passes by force of the declaration of the State which does own it that it is attached to the shore. The rule as to conveyances bounded on non-navigable lakes does not mean that the land under such water also passed to the State on its admission or otherwise, apart from the Swamp Land Act, but is simply a convenient, possibly the most convenient, way of determining the effect of a grant. We are particular in calling attention to this difference, because we fear that there has been some misapprehension with regard to the point."

In his dissenting opinion, Mr. Justice White said (pp. 521, 522-523) that the two Illinois cases above cited

"decided that the effect of the conveyance by the United States to private persons of the border lots was to transfer the title of the bed of the lake to the State of Illinois. * * * Now, as the settled rule in Illinois is that under the principles of conveyancing prevailing in that State no title to the bed of a lake passes to the patentees of the United States by the sale of border lots, I do not perceive how the United States has been divested of its title to the bed of Wolf Lake. To say that, although on the principles of conveyancing under the local law, the bed did not pass, nevertheless, because the United States sold the border lots, the State of Illinois thereby became the owner of the bed of the lake, is, as I understand it, to declare that it is in the power of the State of Illinois to appropriate the property of the United States."

This question was mentioned in Whitaker v. McBride, 179 U. S. 510 (1905), and Marshall Dental Co. v. Iowa, 226 U. S. 460 (1913), but expressly reserved from decision as will later appear.

THE AREA INVOLVED DIVIDED INTO FIVE DIVISIONS AND MEANDER SURVEYS



LEGEND

AREAS INVOLVED SHOWN IN SOLID COLORS

COLOR LEGEND	No.	DIVISION	AREA IN ACRES
	1	LAKE MALHEUR	47,670.40
	2	THE NARROWS	295.60
	3	MUD LAKE	1,466.00
	4	THE SAND REEF	2,792.00
	5	HARNEY LAKE	29,562.00
		TOTAL	81,786.00

THE MEANDER LINE BOUNDARY

SURVEYED BY JOHN H. NEAL IN 1895-1896

OTHER CONNECTING MEANDER LINE SURVEYS

MEANDER LINE SURVEYS OUTSIDE MEANDER LINE BOUNDARY

the shore or meander line involved (105.36 miles in length) is called the Meander Line Boundary, and the area within the Boundary has been divided into five Divisions (1) Malheur Lake; (2) Narrows; (3) Mud Lake; (4) Sand Reef; and (5) Harney Lake.

The distances along the Meander Line Boundary, arranged according to the five Divisions, and the acreage areas therein, are as follows:

The Distances Along the Meander Line Boundary and the Acreage Areas[1] Within Each of the Five Divisions.

Division	Chains	Miles	Acres
1. Malheur Lake	4,723.56	59.044	47,670.40
2. Narrows	376.45	4.706	295.60
3. Mud Lake	806.94	10.087	1,466.00
4. Sand Reef	600.96	7.512	2,792.00
5. Harney Lake	1,920.84	24.011	29,562.00
Totals	8,428.75	105.360	81,786.00

The Meander Line Boundary was run by a number of surveyors, as shown graphically on Appendix 3 contained in "Special Master's Report: Volume 2" and an inset, supra, facing page 4. 80% thereof was surveyed by John H. Neal, 1895-1896, approved in 1897, and extended a distance of 81.098 miles covering both sides of (1) Malheur Lake Division; (2) Narrows Division; (3) Mud Lake Division; (4) substantially the whole of Sand Reef Division, and (5) a negligible portion of Harney Lake Division.

The uplands (surveyed lands) taking only the smallest legal subdivisions which touch the Meander Line Boundary, total 9725.96 acres, and the Neal Survey of 1895-1896 covers all thereof except 172.63 acres and 223.63 acres of school lands bordering on Harney Lake referred to below in subdivisions marked (e) and (f), and one tract of

46.11 acres bordering on Harney Lake patented to John C. Clement, June 13, 1910 and included in the patented lands mentioned below in subdivision marked (a) (see Appendix 8 to "Special Master's Report, Volume 2" and an inset, infra, facing page 16).

At the commencement of the suit, the United States assumed that the only question for decision would be whether the area within the Meander Line Boundary constituted navigable or non-navigable waters, upon the admission of Oregon into the Union February 14, 1859; for if navigable it passed to Oregon and if non-navigable, remained the property of the United States.[3]

In the Motion for Leave to file the Bill of Complaint, it was said:

> "The United States claims that these lakes are non-navigable. The State asserts title to these lake beds on the theory that the lakes are navigable."

Upon the coming in of the Answer, and later with the filing of the Amended Answer and Counterclaim it became clear that the settlement of the question of navigability or non-navigability would not settle the case, for Oregon makes other claims stated in findings XV and XVI, infra.

The uplands, totaling 9725.96 acres, consisted of the following at the commencement of suit:

(a) 4448.12 acres owned by individuals under patents of the United States made up of 3635.08 acres bordering on the Malheur Lake Division; 171.31 acres on the Narrows Division; 516.48 acres on the Mud Lake Division, 79.14 acres on the Sand Reef Division, and 46.11 acres on the Harney Lake Division.

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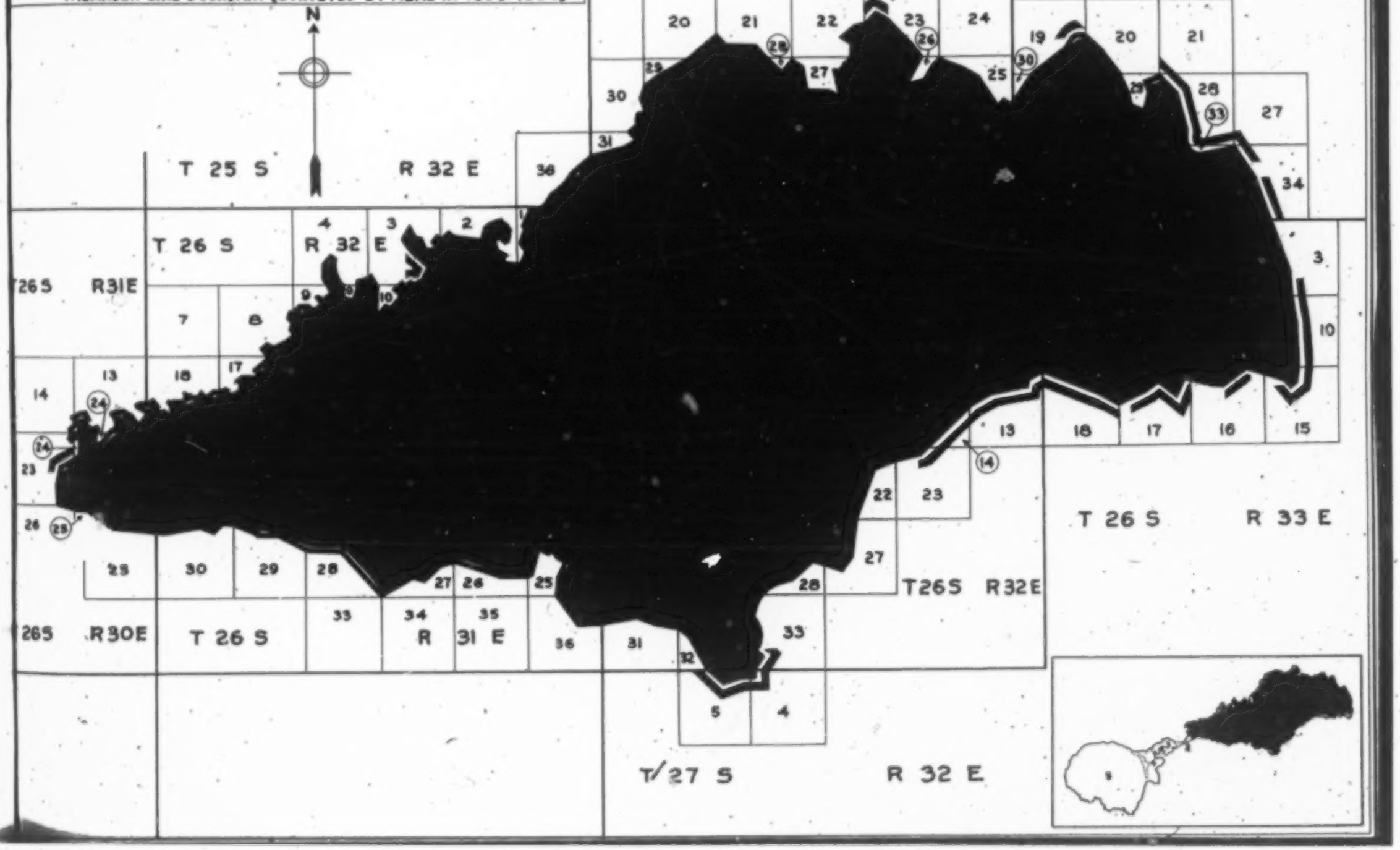
3. See footnote 2, supra, p. 2.

MALHEUR LAKE DIVISION-TOTAL ACREAGE 47,670.40

FRONTAGE BY OWNERSHIP	CHAINS	FEET
UNITED STATES FRONTAGE	954.11	62,971.26
PRIVATE FRONTAGE [No Frontage Owned by State of Oregon]	3,769.45	248,783.70
DISTANCE OF MEANDER LINE BOUNDARY	4,723.56	311,754.96

MEANDER LINE BOUNDARY [SURVEYED BY NEAL IN 1895-1896]



(b) 225.47 acres (135.08 acres bordering on the Narrows Division and 94.39 acres on the Mud Lake Division) of patented lands owned by Oregon which had been acquired by her from patentees through foreclosure of mortgages given to secure loans of public moneys from the Common School Fund of Oregon;

(c) 112.48 acres of school lands (bordering on Malheur Lake Division) owned by individuals who had acquired Oregon's title obtained under the Act of Admission, approved February 14, 1859;

(d) 482.10 acres of indemnity lands (187.79 acres bordering on Malheur Lake Division, 67.53 on the Narrows Division and 226.78 on the Mud Lake Division) owned by individuals who had acquired Oregon's title obtained for deficiencies in school lands elsewhere under the above Act of Admission;

(e) 172.63 acres of school lands (bordering on Harney Lake Division) acquired by Oregon under the Act of Admission through survey approved prior to August 18, 1908, the date of the creation of Lake Malheur Reservation;

(f) 223.63 acres of school lands (62.76 acres bordering on the Sand Reef Division and 160.87 acres bordering on Harney Lake Division) claimed by Oregon under the Act of Admission, through surveys approved after August 18, 1908, hereinafter mentioned (Oregon disclaims title if the Lake Malheur Reservation was legally created August 18, 1908; otherwise not);

(g) 4061.53 acres undisposed of land held by the United States which has not been part of the public domain (subject to entry) since August 18, 1908, the date whereon Lake Malheur Reservation was created (unless unlawfully created, as Oregon claims).

Thus it appears that prior to the commencement of suit Oregon had acquired, or claims to have acquired, from the United States 1216.31 acres bordering on the Meander Line Boundary, of which she sold before suit brought, 594.58 acres, leaving owned or claimed by her 621.73 acres.

The table below gives the facts.

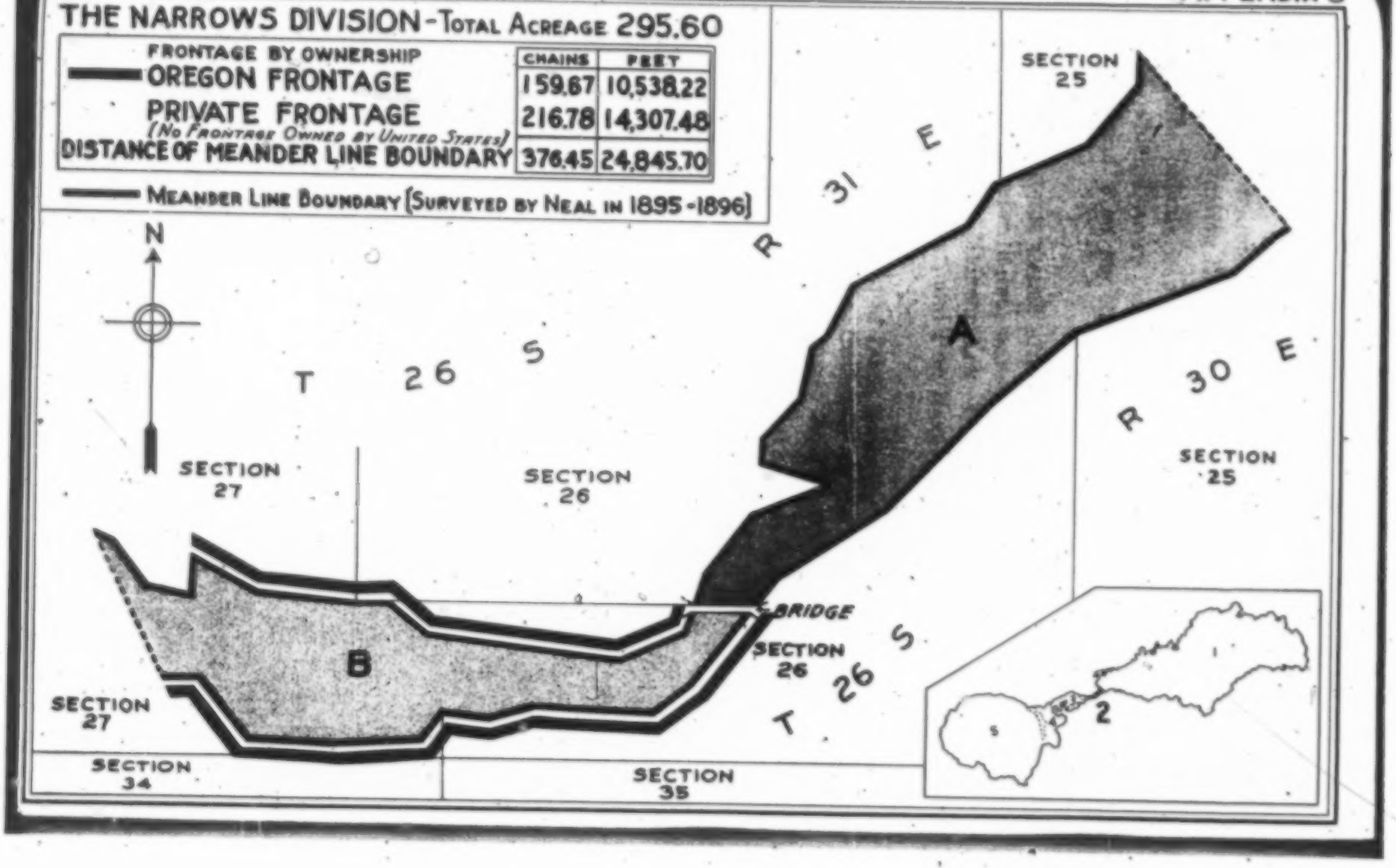
1216.31 Acres Acquired and 594.58 Acres Sold by Oregon Before Commencement of Suit Comprising (a) School Lands; (b) Indemnity Lands and (c) Patented Lands Acquired from Patentees Through Foreclosure.

	School	Indemnity	Patentees	Total
1. Malheur Lake	112.48*	187.79*	.....	300.27
2. Narrows	.....	67.53*	131.08	198.61
3. Mud Lake	.....	226.78*	94.39	321.17
4. Sand Reef	62.76†	.....	.....	62.76
5. Harney Lake	333.50‡	.....	.....	333.50
	508.74	482.10	225.47	1216.31

The dates of the consolidated indemnity lists covered in the above table were: February 20, 1899 and June 28, 1907, covering lands bordering on Malheur, Narrows and Mud Lake Divisions, and December 15, 1908 covering lands bordering on Malheur Lake Division. (The list of December 15, 1908 covered selections made prior to August 18, 1908.) The original indemnity lists numbered 10, reduced in the consolidated lists to 3.

In addition to her claim of title based upon her own littoral proprietorship, Oregon claims title within the Meander Line Boundary through the patenting of up-

*Sold by Oregon before commencement of suit.
†Survey approved after Executive Order August 18, 1908.
‡172.63 acres through survey approved prior and 160.87 acres through surveys approved subsequent to August 18, 1908.


THE NARROWS DIVISION - TOTAL ACREAGE 295.60
FRONTAGE BY OWNERSHIP
OREGON FRONTAGE
PRIVATE FRONTAGE
(No Frontage Owned by United States)
DISTANCE OF MEANDER LINE BOUNDARY
CHAINS
FEET
159.67
10,538.22
216.78
14,307.48
376.45
24,845.70
MEANDER LINE BOUNDARY (SURVEYED BY NEAL IN 1895-1896)
N
T 26 S
R 31 E
R 30 E
SECTION 25
SECTION 27
SECTION 26
SECTION 25
SECTION 27
SECTION 26
SECTION 34
SECTION 35
A
B
BRIDGE
T 26 S
1
2
3

lands to individuals by the United States as fully set forth in finding XV, infra.

The patents issued prior to August 18, 1908, were 52, of which 43 were for land bordering on the Malheur Lake Division, 4 on the Narrows, and 5 on the Mud Lake Division.

The patents issued after August 18, 1908, upon rights initiated prior thereto were 18, of which 12 were for lands bordering on Malheur Lake Division, 3 on Mud Lake, 2 on the Sand Reef, and 1 on Harney Lake.

Frontages (in Chains) of Lands Bordering on the Meander Line Boundary and the Ownership at the Commencement of Suit Arranged According to the Five Divisions.

At the commencement of suit the lands bordering on the Meander Line Boundary had the frontages and were held as below.

Division	United States Chains	State of Oregon Chains	Individuals Chains	Total Chains
1. Malheur Lake	954.11	None	3,769.45	4,723.56
2. Narrows	None	159.67	216.78	376.45
3. Mud Lake	None	72.31	734.63	806.94
4. Sand Reef	510.35	61.18	29.43	600.96
5. Harney Lake	1,688.59	211.04	21.21	1,920.84
Totals	3,153.05	504.20	4,771.50	8,428.75
	37.41%	5.98%	56.61%	100%

Thus the United States had disposed of (at the commencement of suit) and had on hand undisposed of, the frontages, arranged in percentages according to Divisions, as follows:

Percentage of Frontage of Upland in Each of the Five Divisions Disposed of and Undisposed of by the United States at the Commencement of the Suit.

Division	Disposed of Frontage	Undisposed of Frontage
	%	%
1. Malheur Lake	79.80	20.20
2. Narrows	100.00	.....
3. Mud Lake	100.00	.....
4. Sand Reef	15.08	84.92
5. Harney Lake	12.09	87.91
6. Five Divisions collectively	62.59	37.41

Percentage of Frontage of (a) School, (b) Indemnity and (c) Patented Upland in Each of the Five Divisions Which had Been Disposed of by the United States at the Commencement of the Suit.

Division	Frontages Disposed of			
	School	Indemnity	Patented	Total
	%	%	%	%
1. Malheur Lake	1.34*	4.80*	73.66	79.80
2. Narrows	.....	22.41*	77.59	100.00
3. Mud Lake	.....	32.40*	67.60	100.00
4. Sand Reef	10.18†	.....	4.90	15.08
5. Harney Lake	10.99‡	.....	1.10	12.09

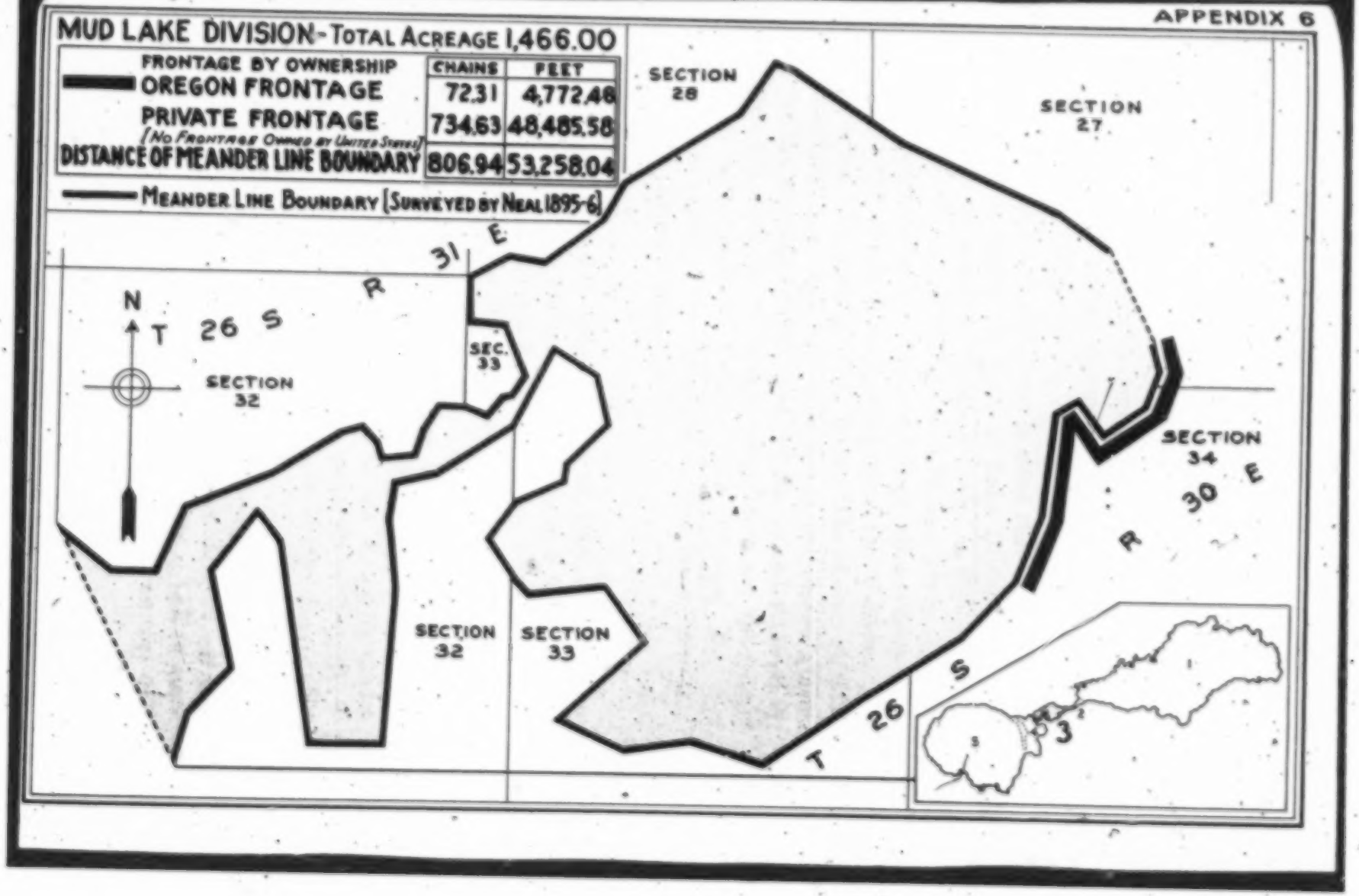
*Percentage represents chains frontage of lands acquired and sold by Oregon before commencement of suit, as follows: 1.34%, 62.24 c., 112.48 a.; 4.80%, 227.10 c., 187.79 a.; 22.41%, 84.39 c., 67.53 a.; 32.40%, 261.47 c., 226.78 a.

†Percentage represents 61.18 chains frontage of 62.76 acres claimed by Oregon under survey approved after Executive Order.

‡Percentage represents 211.04 chains frontage of 333.50 acres made up as follows: 5.12%, 98.35 c., 172.63 a.; 1.06%, 20.39 c., 20.27 a.; 4.81%, 92.30 c., 140.60 a.

172.63 acres were acquired under survey approved before Executive Order and the remainder 20.27 a. and 140.60 a. by surveys approved after Executive Order.

APPENDIX 6


MUD LAKE DIVISION - TOTAL ACREAGE 1,466.00
FRONTAGE BY OWNERSHIP
OREGON FRONTAGE
PRIVATE FRONTAGE
[NO FRONTAGE OWNED BY UNITED STATES]
DISTANCE OF MEANDER LINE BOUNDARY
CHAINS
FEET
72.31
4,772.46
734.63
48,485.58
806.94
53,258.04
MEANDER LINE BOUNDARY [SURVEYED BY NEAL 1895-6]
N
T 26 S
R 31 E
SECTION 32
SEC. 33
SECTION 28
SECTION 27
SECTION 34
R 30 E
SECTION 32
SECTION 33
T 26 S

The title, interests and estates within the Meander Line Boundary claimed by the United States and Oregon severally are inconsistent with claims which might be asserted by the upland patentee proprietors, and due note is to be taken of the circumstance that the upland proprietors are not parties to this suit.

In addition, it is to be kept in mind that a large portion of the area within the Malheur Lake Division has been for years occupied by "settlers", who at the commencement of this suit numbered about 70, and whose combined "settlements" at that time embraced about 29,406 acres out of the 47,670.40 acres comprising the Malheur Lake Division. See finding XIX, infra. The claims of these "settlers" may well be hostile to (a) the United States; (b) the State of Oregon; and (c) the upland proprietors, although some of the upland proprietors are themselves "settlers" within the Malheur Lake Division. Due note is to be taken of the circumstance that these "settlers" are not parties to this suit.

By an Executive Order, August 18, 1908, the President created the Lake Malheur Reservation in terms shown on the frontispiece to this Report, including within the Reservation all the lands within the shore or meander line above mentioned (81,786 acres) and the uplands limited to the smallest legal subdivisions bordering on the shore, adding 9725.96 acres as above. (The shore line of Lake Harney was erroneously drawn in the Executive Order so as to exclude 115.92 acres as indicated on the copy of the Order, which is the frontispiece of this Report and in finding VII, infra.

In the Executive Order it was provided that the creation of the Reservation was "subject to valid existing rights" evidencing there was no intention to call in question titles of the upland proprietors existing on that day.

The Executive Order is of no real importance in this case except as it affects the question whether Oregon owns 62.76 acres in the Sand Reef Division and 160.87 acres in the Harney Lake Division claimed as school lands under surveys approved after the creation of the Lake Malheur Reservation whereby the lands mentioned were withdrawn from the public domain and entry (see finding VIII).

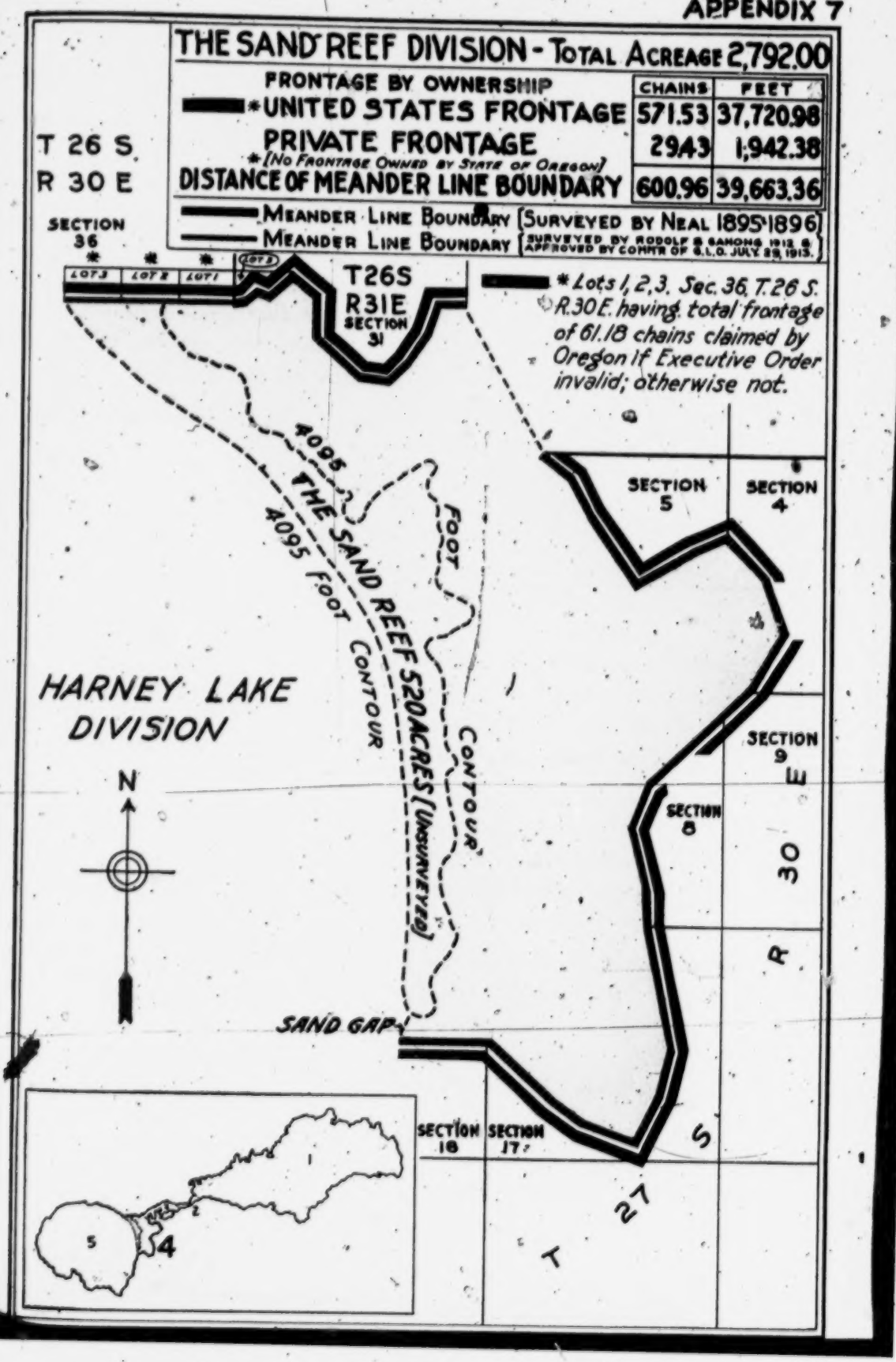
The Executive Order, however, has an adventitious importance in the circumstance that it affords opportunity for the use of "all smallest legal subdivisions" in delimitation of upland proprietorship. (It is to be remembered of course that the patents granted were not, at least in most instances, limited to lands between the limits of the Lake Malheur Reservation and the Meander Line Boundary, but that these smallest legal subdivisions were parts of patented areas lying partly inside and partly outside of the Reservation.)

Throughout this Report, including the Findings, Conclusions of Law, and recommended form of Decree, the limits of the Lake Malheur Reservation are called the Executive Order Boundary.

The pleadings are (a) Bill of Complaint filed December 1, 1930; (b) Answer of Defendant filed February 24, 1931; (c) superseded by Amended Answer and Counterclaim of Defendant filed October 5, 1931; and (d) Stipulation Waiving Reply to Amended Answer and Counterclaim, reading as follows:

> "It is hereby stipulated and agreed by and between the parties hereto that the filing of a reply on behalf of the plaintiff is waived by the defendant and that the allegations of fact set forth in the defendant's counterclaim shall be deemed denied by the plaintiff."

APPENDIX 7


THE SAND REEF DIVISION - TOTAL ACREAGE 2,792.00
FRONTAGE BY OWNERSHIP
CHAINS
FEET
*UNITED STATES FRONTAGE
571.53
37,720.98
PRIVATE FRONTAGE
29.43
1,942.38
*(NO FRONTAGE OWNED BY STATE OF OREGON)
DISTANCE OF MEANDER LINE BOUNDARY
600.96
39,663.36
MEANDER LINE BOUNDARY (SURVEYED BY NEAL 1895-1896)
MEANDER LINE BOUNDARY (SURVEYED BY RODOLF & GAMONG 1912 & APPROVED BY COMMR OF G.L.O. JULY 28, 1913.)
T 26 S.
R 30 E
SECTION 36
LOT 3
LOT 2
LOT 1
LOT 5
T26S
R31E
SECTION 31
* Lots 1, 2, 3, Sec. 36, T. 26 S. R. 30 E. having total frontage of 61.18 chains claimed by Oregon if Executive Order invalid; otherwise not.
4095 FOOT CONTOUR
THE SAND REEF 520 ACRES (UNSURVEYED)
4095 FOOT CONTOUR
SECTION 5
SECTION 4
SECTION 9
SECTION 8
HARNEY LAKE DIVISION
N
SAND GAP
SECTION 18
SECTION 17
T 27 S
R 30 E
1
2
3
4
5

The Order of Appointment of Special Master was made April 13, 1931, and the text thereof appears in the Supplement hereto, infra, page i.

On November 1, 1931, at Burns, Oregon, an inspection of the areas within the Meander Line Boundary was had by the Special Master, accompanied by counsel, the official stenographer, and engineers representing both the plaintiff and the defendant. At that time the entire area was dry and showed no signs in the soil of ever having been under water except about 400 acres in Malheur Lake to a negligible depth which was surrounded by about 1000 acres of mud. This area of, say, 1400 acres lay just north of the south meander line where it crosses Section 31, Township 26 South, Range 32 East, South of Malheur Lake (see Joint Abstract of Record, Volume II, pages 858-860; frontispiece, and Appendix 4 inset facing p. 6) and east of the Blitzen River which was then carrying or had shortly before carried the waters of the Sodhouse Spring into Malheur Lake. The elevation of the 1400 acres varied from 4090 to 4092 feet above sea level, which was below the average elevation of the meander line fixed in the findings as 4093 feet above sea level.

The examination of witnesses took place at Burns, Oregon, November 2-14, 1931. There were 143 witnesses. The transcript of testimony occupies 2495 typewritten pages.

At the hearings Mr. Charles M. Blackmar, Special Assistant to the Attorney General; Mr. Randolph S. Collins, Attorney, Department of Justice; and Mr. W. F. Staley, Assistant Solicitor, Department of Agriculture, appeared for the plaintiff, and Mr. I. H. Van Winkle, Attorney General of Oregon, and Mr. L. A. Liljeqvist, Assistant Attorney General of Oregon, for the defendant.

After the testimony had been transcribed stipulations were made by counsel that named witnesses would testify

as agreed and the deposition of one was taken. Thereafter counsel prepared a condensation of the evidence and arranged the same according to subjects of proof which was printed as "Joint Abstract of Record, Vol. I (pp. 1 to 630), and Vol. II (pp. 631 to 1166). Later briefs were submitted and the case orally argued in San Francisco between October 30 and November 8, 1933. Since the latter date a large amount of work has been done in supplying official records and other data pertinent to the case, so as to relieve it from uncertainty and ambiguity.

The case involves questions of fact and questions of law stated below.

Questions of Fact.

(1) Was the area involved, i. e., the land and overlying water within the Meander Line Boundary, property of the United States upon the admission of Oregon into the Union February 14, 1859?

(2) Did the area involved constitute navigable waters (in fact) on February 14, 1859?

(3) Were there stable lands constituting islands and/or promontories within the area involved on February 14, 1859?

(4) Was the meander line (81.098 miles) laid down by J. H. Neal in 1895-1896 and approved in 1897, a correct line?

(5) Were there relicted lands within the Meander Line Boundary at the commencement of the suit?

(6) Are the grants made by the United States to lands bordering upon the Meander Line Boundary comparable in form to those involved in *Hardin v. Jordan,* 140 U. S. 371?

Questions of Law.

(1) Is the common law in respect of the effect of conveyances of lands bordering on a meandered lake (i. e., that the grantee takes to the center of the lake) in force in Oregon; or does the local law provide that the grantee takes only to the water's edge?

(2) If the common law as declared in *Hardin v. Jordan*, is in force in Oregon, is that rule applicable to lakes of the character and size of Malheur and Harney Lakes, or should they be held exceptions and the rule declared inapplicable thereto?

(3) If the rule in Oregon limits the grantee to the water's edge does the title from the water's edge to the center of the lake pass to the State of Oregon or remain in the United States, if and when the latter patents or otherwise conveys the upland?

(4) If the rule in Oregon be that the grantee takes to the center of the lake, does that rule apply to a school section to which Oregon became entitled under the act of admission, effective, however, only upon approved survey (240 U. S. 210, lines 1-7) if it be disclosed that the section borders upon a meander line; and is the rule applicable to school sections equally applicable to indemnity lands taken in lieu of deficiencies in school sections?

(5) If fractional sections of school lands border upon a meandered lake and the State uses the deficiency within the meandered lake as base for lieu lands, is the State also entitled to the benefit of the rule of *Hardin v. Jordan*?

(6) Are the statutes pleaded *in haec verba* in the Amended Answer and Counterclaim (also set out in Supplement, infra, pp. vi-xiv) effective to give Oregon title to the lands within the Meander Line Boundary, or to any thereof?

(7) Was the Executive Order of August 18, 1908 valid as and from that date?

(8) Did the school lands (62.76 acres bordering on the Sand Reef Division and 160.87 acres (20.27 acres plus 140.60 acres) on the Harney Lake Division) the surveys whereof were approved subsequent to the Executive Order, August 18, 1908, pass to Oregon or are they still the property of the United States (*United States v. Morrison*, supra)?

(9) In view (1) of the absence from the case as parties of (a) the upland proprietors and (b) the "settlers" within the Meander Line Boundary, and that (2) Oregon takes positions inconsistent with claims that they might be expected to make, how far should the court proceed in the making of a decree without their presence?

(10) Is there anything in the case which requires the application of the rule that a plaintiff in a suit to quiet title must recover upon the strength of his own title and not upon the weakness of the title of the defendant?

We proceed to the consideration of these questions.

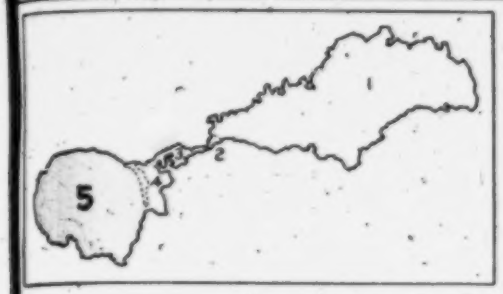
Questions of Fact.

(1) Was the Area Involved, i. e., the Land and Overlying Water Within the Meander Line Boundary, Property of the United States Upon the Admission of Oregon Into the Union February 14, 1859.

This fact is covered by finding V, which in part reads as follows:

"A vast area of public domain situated in what is now southeastern Oregon was owned by the United States at and immediately preceding the admission of Oregon into the Union, including the lands here involved. . . .

Prior to February 14, 1859, no portion of any of the five Divisions or the waters or shores thereof was reserved, disposed of or granted away, or attempted to be reserved, disposed of or granted away by the United States by statute, treaty, patent or otherwise; and no portion of any of



N

T 26 S R 30 E

T26S R29E

T 27 S R 29½ E

T 27 S R 30 E

T 28 S R 29¼ E

NOTE:

Three fractional Sections 36 border the meander line of Harney Lake. The survey of one (in T.26 S.-R.29 E.) was approved before the Executive Order; the surveys of the other two (in T. 27 S.-R.29½ E. and T.26 S. R.30 E.) were approved afterwards.

Oregon used 67.37 acres of Section 36, T.26 S.-R.29 E. within Meander Line as base for indemnity lands elsewhere.

Laying on one side question whether Oregon owns lands, surveys whereof were approved after Executive Order, the following questions are presented:

(a) Are Oregon school lands upon the footing accorded to patented land under Hardin v. Jordan, 140 U.S. 371, Mitchell v. Smale, 140 U.S. 406, and Hardin v. Shedd, 190 U.S. 508.

(b) If so, does the use by Oregon of deficiency of 67.37 acres in Section 36, T.26 S.-R.29 E. amount to an election denying it privileges accorded to patented land as above.

HARNEY LAKE DIVISION-TOTAL ACREAGE 2956.00

FRONTAGE BY OWNERSHIP	CHAINS	FEET
*UNITED STATES FRONTAGE	1,801.28	118,884.48
*OREGON FRONTAGE	98.35	6,491.10
PRIVATE FRONTAGE	21.21	1,399.86
DISTANCE OF MEANDER LINE BOUNDARY	1,920.84	126,775.44

THE MEANDER LINE BOUNDARY
SURVEYED BY NEAL IN 1895 AND 1898
SURVEYED BY OTHERS BETWEEN 1879 AND 1912

*Lot 4, Section 36, T. 26 S.-R.30 E. with a frontage of 20.39 chains, and Lots 1, 2, 3, 4, Section 36, T.27 S.-R. 29½ E. with total frontage of 92.30 are claimed by Oregon if Executive Order invalid; otherwise not.

4095 UNSURVEYED 4095 FOOT CONTOUR

FOOT CONTOUR

SAND GAP

the five Divisions has been disposed of by the United States since February 14, 1859, in terms, nor at all, unless as a legal result of the patenting or other disposition of the uplands by the United States."

(2) Did the Area Involved Constitute Navigable Waters (in Fact) on February 14, 1859.

The issue of navigability or non-navigability is dealt with in finding XXI, which reads as follows:

"No one of the Divisions lying within the Meander Line Boundary was on February 14, 1859, and no one of them has since been navigable in fact, and neither trade nor travel did then or at any time since has or could or can move over said Divisions, or any of them, in their natural or ordinary conditions according to the customary modes of trade or travel over water; nor was any of them on February 14, 1859, nor has any of them since been used or susceptible of being used in the natural or ordinary condition of any of them as permanent or other highways or channels for useful or other commerce. The region thereabouts did not, nor did any of the Divisions on February 14, 1859, nor has it nor have they since produced commodities which would or could be transported by water, nor has it been nor have they been capable of producing commodities which would or could be transported by water, nor was said region nor any of said Divisions capable of sustaining a population to be served by water transportation."

This finding establishes the case of non-navigability within the decisions of this Court quoted from or cited below.

The Daniel Ball, 10 Wall. 557, 563:

> ". . . they [the rivers] are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce,

over which trade and travel are or may be conducted in the customary modes of trade and travel on water. . . ."

Oklahoma v. Texas, 258 U. S. 574, 591:

". . . we think it [the evidence] establishes that trade and travel neither do nor can move over that part of the river, in its natural and ordinary condition, according to the modes of trade and travel customary on water; in other words, that it is neither used, nor susceptible of being used, in its natural and ordinary condition as a highway for commerce. . . . A greater capacity for practical and beneficial use in commerce is essential to establish navigability."

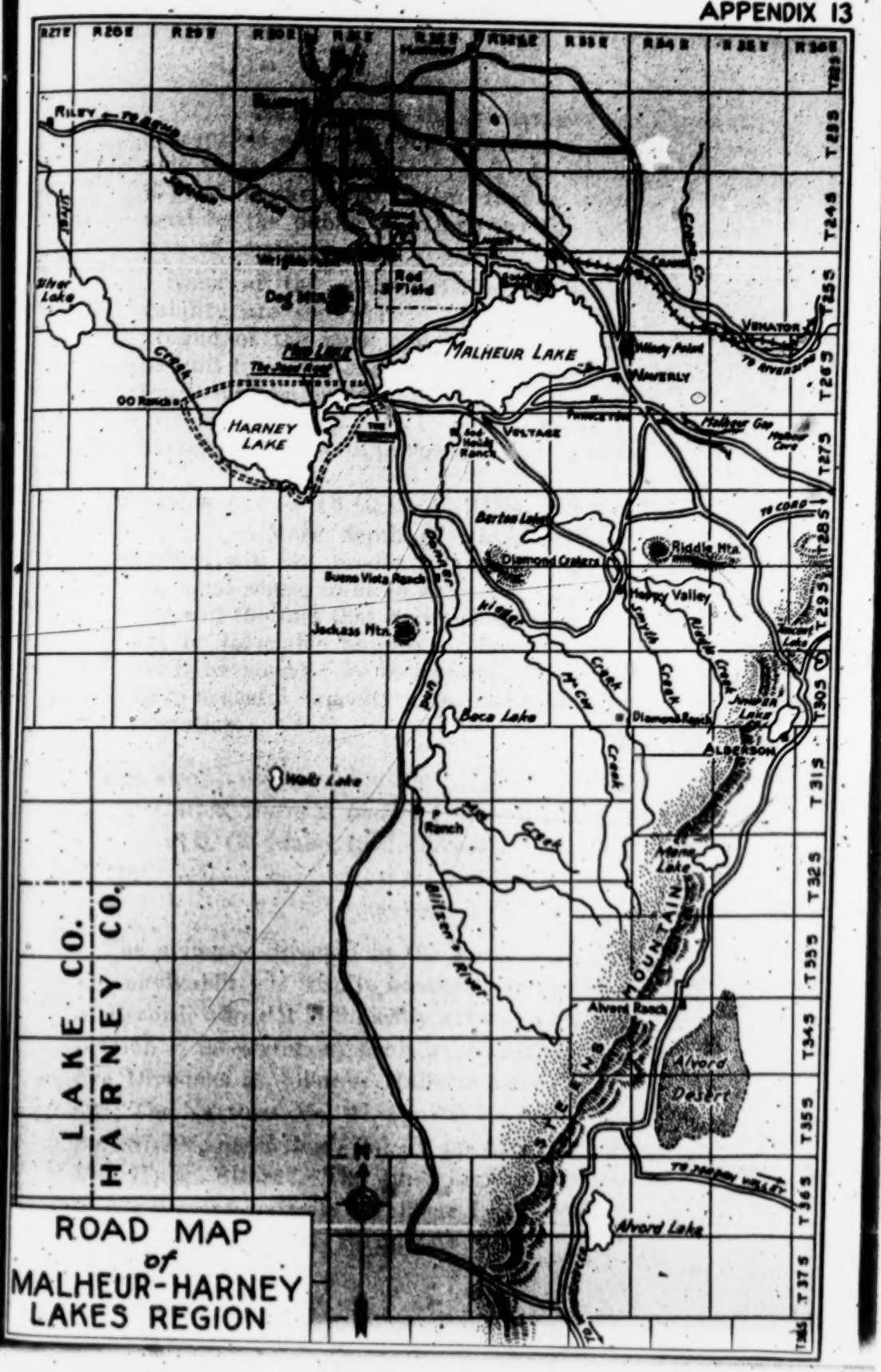
United States v. Holt State Bank, 270 U. S. 49, 56:

"The rule long since approved by this Court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had,—whether by steamboats, sailing vessels or flatboats,—nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce. . . ."

United States v. Utah, 283 U. S. 64, 76, carries the above quotation and cites in a marginal note many decisions of this Court to the same effect.

The following cases from courts below are to the same effect.

Toledo Liberal Shooting Co. v. Erie Shooting Club (6 C. C. A. 1898), 90 Fed. 680, 682:


R27E
R28E
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T27S
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T29S
T30S
T31S
T32S
T33S
T34S
T35S
T36S
T37S
Riley
To Burns
Silver Lake
Dog Mtn.
Red Field
Malheur Lake
Harney Lake
Princeton
Voltage
Bartlett Lake
Diamond Craters
Riddle Mtn.
Buena Vista Ranch
Jackass Mtn.
Happy Valley
Boca Lake
Diamond Ranch
Alkali Lake
Alkali Creek
Mud Creek
Silvies River
Alvord Ranch
Alvord Desert
Alvord Lake
To Denio
To Riverside
To Burns
To Crane
To Juntura
To Diamond
To Frenchglen
To Fields
To Denio
LAKE CO.
HARNEY CO.
N
ROAD MAP
of
MALHEUR-HARNEY
LAKES REGION

". . . At no time is the greater part of this marsh susceptible of supporting 'commerce', in any reasonable sense of the term. . . . To be navigable in law, it must be navigable in fact; that is, capable of being used by the public as a highway for the transportation of commerce.

"None of the characteristics of commercial navigability are shown here. It is the natural feeding ground of the duck and other waterfowl. In their pursuit by canoe and flat-bottomed ducking boats the water may be navigated. That is not commerce, and proves nothing. . . . It is the capability of being navigated for useful purposes which is the test. . . ."

Harrison v. Fite (8 C. C. A. 1906), 148 Fed. 781, 784:

". . . Mere depth of water, without profitable utility, will not render a water course navigable in the legal sense, so as to subject it to public servitude, nor will the fact that it is sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes. To be navigable a watercourse must have a useful capacity as a public highway of transportation. . . ."

See also:

United States v. Ladley (State of Idaho Intervenor) (D. Ct. Idaho, 1933, Cavanah, D. J.), 4 Fed. Supp. 580.

The evidence directed to the issue of navigability and non-navigability is readily accessible in the Joint Abstract of Record, where it is topically arranged. The far greater portion of the testimony deals with water conditions in the five Divisions as follows: Malheur Lake, Vol. I, pp. 348-622; The Narrows, Vol. II, pp. 755-784; Mud Lake, Vol. II, pp. 787-794; Sand Reef, Vol. II, pp. 826-852; Harney Lake, Vol. II, pp. 810-817. The other important features relate to fur bearing animals (Malheur Lake) Vol. II, pp. 714-720; and boating, Vol. II, pp. 963-1014.

As counsel for Oregon attach weight and significance to (a) trapping operations and (b) boating, the evidence upon these two points is summarized.

Trapping.

The evidence relating to trapping discloses that (a) prior to the Executive Order there were "lots of muskrats" caught in Malheur Lake in the fall and spring but principally in the winter months, in tule areas where they always nested (Joint Abstract of Record, pp. 715, 717, 718, 722, 998); (b) after 1908 the Government kept records of the trapping operations. Benson, United States Warden, testified that the largest number of muskrats trapped was 6000 in 1909, and his records show that between November, 1918 and February, 1919 there was a total of 8477 muskrats trapped in Malheur Lake. (Joint Abstract of Record, p. 721.) Dr. Hibbard estimates the catch to be "several thousand each year". (Joint Abstract of Record, p. 720.)

In the early days the skins brought 5¢ each. After 1909 the average price was 40¢ each and the highest $3.00 each. Heinz says he got from five cents to $1.00 apiece for the skins. (Joint Abstract of Record, pp. 717, 721, 957.)

In the eighties there were only one or two trappers. (Hanley, Joint Abstract of Record, p. 718.)

Prior to 1908 three trappers used home made row boats; after 1908, one trapper used a row boat and another used both a row boat and (between 1911 and 1918) a motor boat. The other trappers either waded or trapped on foot. (Joint Abstract of Record, pp. 715, 967, 980, 982, 995, 997-998.)

The industry did not become important. (Gardner, p. 715.)

Dr. Hibbard testified that due to the subsidence of the water the muskrats began to disappear; that the govern-

ment would not allow any one to take the few that remained; and in fact, there had not been any for a number of years (pp. 719-720).

Boating.

The boating which took place in the area involved, to which much importance is attached by counsel for Oregon, had no commercial aspects and is no indication of navigability; it was such as might reasonably be expected to occur in a swampy area of the character and magnitude of that here involved. The boating was quite as consistent with the want of navigability as with navigability in fact.

In order not to unduly prolong the report, a condensed statement of the testimony on boating will be found in the Supplement to this report, infra, pp. xv-xix.

The foregoing makes any prolonged review unnecessary, and we therefore limit comment to the few observations which follow, thereby avoiding a mere anticipation of matters which will be fully argued upon exceptions to the report.

The issue of navigability was chiefly concerned with Malheur Lake although Oregon has made special request for a finding that Mud Lake was navigable. The finding above quoted, however, covers and is intended to cover the five Divisions.

Finding XXII, infra, declares that the line of ordinary or mean high-water on February 14, 1859, and at the time of the Neal survey in 1895-1896 was at a mean elevation of 4093 above sea level; and gives the depths of water throughout the Malheur Lake Division and all other Divisions except Harney Lake Division (not available) upon an assumed water surface elevation up to that line.

It is also therein found that except in years of abundant precipitation and favorable runoff, sufficient water is not

available to maintain a mean or average water surface elevation much above 4093 in the area within the Meander Line Boundary.

The water surface elevation has never been consistent.

It is difficult to entertain the idea that a lake made up of 47,670.4 acres is navigable, with water throughout the lake at a mean elevation of 4093 and with depths shown in finding XXII as follows:

Malheur Lake Division at 4093 (Depths).

		Acres
(a)	Lands under water of 1 foot, or less	11,715.8
(b)	Lands under between 1 and 2 feet	10,126.6
(c)	Lands under between 2 and 3 feet	6,988.4
(d)	Lands under between 3 and 4 feet	10,821.2
(e)	Lands under between 4 and 5 feet	26.8
	Lands under water	39,678.8
	Lands above water surface	7,991.6
	Total	47,670.4

The lands classified according to depths are not in compact bodies (Plaintiff's Contour Maps 3A and 4A) which strengthens the conclusion that the waters were not navigable in any practical sense.

There is not a single item of evidence that any commodities were ever transported over the waters of Malheur Lake except a small quantity of hay in a single instance (Johnson, Joint Abstract, Vol. II, p. 979), and fur-bearing animals.

The annual evaporation in the region was 40 inches per annum. The area involved was truly and aptly described by Colonel William Hanley, a well-known figure in that

country, as an "evaporating pan" (Joint Abstract of Record, Vol. I, p. 390, line 10).

The region has been dry for years and the experience of an actual inspection of the area involved on November 1, 1931, has been already related (supra, p. 13).

The fact that the area involved is non-navigable seems to have been taken for granted from very earliest days until the enactment of the Oregon legislation of 1921.

Lake Malheur, 16 L. D. 256 (1893). The Secretary of the Interior on March 3, 1893, said (p. 257):

> "It appears that this lake is over twenty miles long, nearly east and west, and about five miles wide. It is a shallow lake, little more than a swamp or marsh, lying three thousand six hundred feet above sea level."

Lake Malheur, 19 L. D. 439 (1894). The Secretary of the Interior, December 3, 1894, speaks of the "non-navigable Lake Malheur", and cites *Hardin v. Jordan,* 140 U. S. 371, as pertinent because it dealt with "the riparian rights of owners of lands upon such non-navigable bodies of water" (p. 440).

French Live Stock Company v. Springer, 35 Ore. 312, 322 ft., 58 Pac. 102, 105, col. 1, line 13 (1899), said that "the fact of the existence of Malheur Lake, a non-navigable body of water, was admitted".

The Pacific Live Stock Co. v. Armack, 30 L. D. 521 (1901). The Secretary of the Interior, March 11, 1901, quotes from a description of a township noted on the margin of a plat (p. 523):

> "What is usually called Malheur Lake is only a vast marsh or tule swamp with comparatively little open water and is susceptible of reclamation by cutting a canal through the peninsula which separates Harney from Malheur Lake."

French-Glenn Live Stock Co. v. Springer, 185 U. S. 47 (1902), affirming same case in 35 Ore. 312, supra. This Court said (p. 53 foot):

> "The fact of the existence of Malheur Lake, a non-navigable body of water, was admitted."

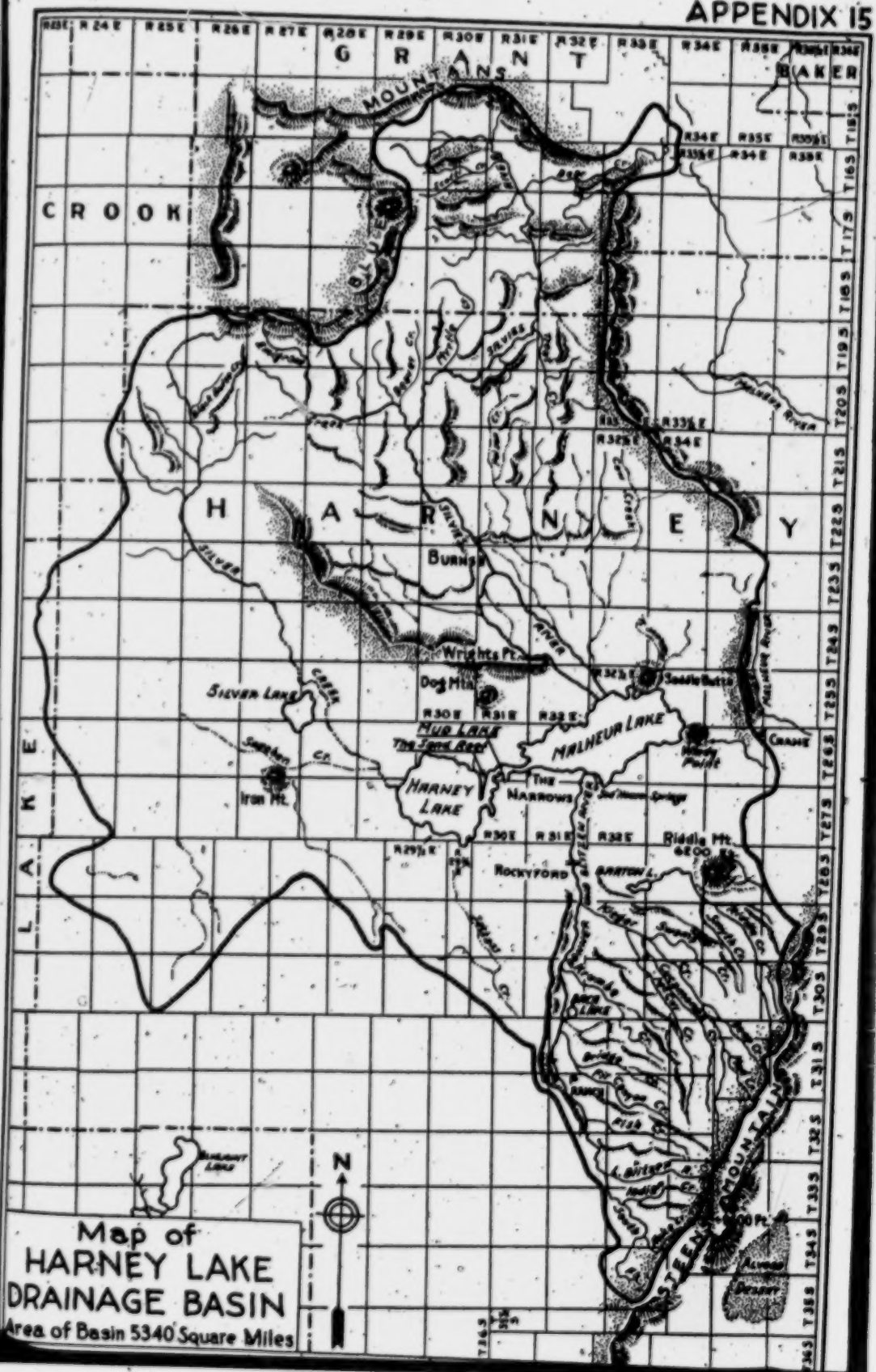
Cawlfield v. Smyth, 69 Or. 41, 138 Pac. 227, 228, c. 1 top (1914). The opinion speaks of "Malheur Lake, a non-navigable body of water, fed by Silvies River on the north and Blitzen River on the south, and finding its outlet through a channel which its waters have forced into Harney Lake" (p. 42).

In re Rights to Use of Waters of Silvies River, 115 Or. 27, 237 P. 322 (1925). It is said:

> "Malheur and Harney Lakes have no outlets and water generally flows from the former into the latter (p. 33 m., p. 324, c. 2, m.) . . . The lowest part of the [Harney] valley [is] a huge swamp known as Malheur Lake" (p. 34, ft., p. 325, c. 1, m.).

It will be seen that Malheur Lake is the one most frequently mentioned. The proofs show beyond doubt that Malheur Lake was not navigable and its non-navigability was taken as a matter of course by all who had occasion to deal therewith until Oregon passed Chapter 282, Sec. 1, subs. (c), General Laws of Oregon, 1923 (Amended Answer and Counterclaim, p. 38, Supplement to this Report, infra, p. xi). If Malheur Lake was non-navigable, there is little argument for the navigability of either Mud Lake or Harney Lake, and still less for the Narrows and Sand Reef Divisions.

(A list of meandered lakes in Oregon described as navigable and non-navigable will be found in Joint Abstract of Record, Volume II, pp. 875-878, coupled with Ganong's conformatory table [pp. 878-882], and Jewett's general description of the lakes [pp. 882-889].)



Map of
HARNEY LAKE
DRAINAGE BASIN
Area of Basin 5340 Square Miles

(3) Were There Stable Lands Constituting Islands and/or Promontories Within the Area Involved on February 14, 1859.

The evidence shows that the lands above a water surface elevation of 4093 comprised 7991.6 acres in Malheur Lake Division, 21.2 acres in the Narrows, 88 acres in the Mud Lake and 1227 in the Sand Reef (see finding XXII, infra).

It has been impossible to furnish a similar table in respect of Harney Lake because no survey nor measurements for the purpose are available. See finding XXII, infra.

The acreages above 4093 are not generally compact bodies although there are two well-known islands, Pelican Island, 840 acres, and Cole Island, 350 acres, within the Malheur Lake Division. Other islands, unnamed and unsurveyed within that Division aggregate 4921.6 acres. The promontories therein aggregate 1880 acres: thus giving the total 7991.6 acres above 4093.

These islands and promontories are stable lands, and the Conclusions of Law declare them to be the property of the United States (in any and all events).

(4) Was the Meander Line (81.098 Miles) Laid Down by J. H. Neal in 1895-1896, and Approved in 1897, a Correct Line.

The Neal survey was preceded by the following surveys made by direction of the Secretary of the Interior pursuant to the laws of the United States as follows: 1875, J. W. Meldrum; 1877, J. W. Meldrum; 1877, Rufus S. Moore and Henry Meldrum; 1879, H. C. Perkins; 1888, J. H. Neal; and 1892, Henry C. Cooke.

Appendix 3 shows where these earlier surveys were run (see Special Master's Report, Volume 2, and also inset facing page 4, supra).

Petitions to the Secretary of the Interior for a resurvey resulted in the Neal survey, in respect whereof see finding XIII, infra.

Finding XIII declares that the meander lines run by Neal were correctly run, a finding in accordance with allegations of the Amended Answer and Counterclaim (pp. 29, 49).

At the hearing at Burns, Oregon, November, 1931, the United States took the position that the correctness of the Neal line was not an issue, although not conceding that it was a correct line (Joint Abstract of Record, Vol. I, p. 239). The course of testimony thereafter indicated, or might be interpreted to indicate, that the State of Oregon had abstained from offering proof to support the correctness of the Neal survey upon the assurance of the United States that the question was not an issue in the case.

Later, I concluded that the argument of the State of Oregon respecting the effect of grants of the United States to upland proprietors bordering on the Neal meander line rested upon the correctness of that line and that it was not appropriate to leave the state of the proofs in the then condition.

Accordingly, I notified counsel that if necessary the case would be reopened for additional evidence respecting the correctness or incorrectness of the Neal survey. The result was that at the commencement of the argument at San Francisco, October 30, 1933, counsel agreed that no evidence upon the issue, which had not been offered, was available to either side (see Transcript of Argument, October 30, 1933, page 2497).

It is to be said that the United States had Mr. Neal under subpoena at Burns, Oregon, in November, 1931, and notwithstanding his presence, did not call him as a witness; nor did Oregon, which contented itself with standing upon the official records of Neal's survey.

It appears elsewhere that 79.80% of the frontage of lands bordering on the Neal line within the Malheur Lake Division has been disposed of by the United States, and that the United States itself has retained 20.20% only. In the Narrows and Mud Lake Divisions it has parted with 100% of the frontage of the lands bordering on the Neal line.

There is no evidence to show that since the approval of the Neal survey in 1897 it was ever challenged until the filing of the Bill of Complaint in this suit, more than one-third of a century later, except as to a negligible portion in the case of *Cawlfield v. Smyth*, 69 Or. 41, 138 Pac. 227 (1914), where the defendant failed in his attack (although he prevailed below).

The United States challenges the correctness of the Neal line as a whole (81.098 miles).

On the oral argument, October 31, 1933, Mr. Blackmar, for the United States, said (Transcript, p. 2640):

> "I am arguing for the invalidation of the whole line; I think the whole line is erroneous; but if it should come to a future controversy, of course, each person would have his rights, and would constitute a separate case."

It is implied in Mr. Blackmar's remarks, and the fact is, that surveys are not generally invalidated over a whole line, certainly not if 81.098 miles in length. It is also true that a finding on the Neal survey in this case, will not bind nor enure to the benefit of third persons. If, however, Oregon's rights rest upon or involve the prerequisite of a correct survey, it is necessary to making a finding upon the fact, and it has been accordingly found (Finding XIII, infra) that "the meander lines run by Neal were correctly run and properly laid down, made in good faith and without fraud or gross error or mistake, and have ever since their approval remained unimpeached and constitute a

correct establishment of the meander lines surveyed by him".

There is striking support for this conclusion in the circumstance that at the time Neal ran the survey there were people on the ground who were interested in its location but who did not object thereto after it was made.

In support of its argument that the line was incorrectly run, the United States points out that a number of "settlers" were "swamping" in the meandered area at the time it was run and occupying portions thereof. The answer to this suggestion is that if the "settlers" had a firm belief that the line was improperly run and improperly located "their" tracts within the meandered area, they would have complained and sought a resurvey. This they did not do.

It is true that the United States produced engineers of outstanding ability and reliability to impeach the Neal line. These engineers enjoyed the benefit of the advance in the science of cadastral engineering over a period of thirty years (1895-1931) and had the history of the region through that length of time at their command. It would be surprising if in 1931 they would run the line as Neal ran it in 1895-1896. The matter is to be dealt with in a practical way and I am of the opinion that the finding that Neal's line was correctly run is supported by all considerations of justice and practicality.

(5) Were There Relicted Lands Within the Meander Line Boundary at the Commencement of the Suit.

In 1914 the Supreme Court of Oregon decided *Cawlfield v. Smyth,* infra, which involved claims (a) under the doctrine of *Hardin v. Jordan;* and (b) of reliction.

The court held following its decision in *French Livestock Co. v. Springer* in 35 Ore. 312, 58 Pac. 102 (1899) that in the circumstances it was of no moment whether

the upland proprietor took under the doctrine of *Hardin v. Jordan* or by reliction because the result was the same in the physical facts there present. The court decided for the upland proprietor upon the basis of reliction and held that that doctrine existed and would continue in Oregon "until legislation of the state has changed its policy on this point".

This decision evidently suggested the enactment of Oregon's lake legislation in the Act of May 24, 1921, whereby she abolishes the right of the riparian owner to future reliction and takes to herself title to lands relicted in the future which would otherwise have passed to the riparian owners. The result of that doctrine is that the owner of the bed loses the relicted lands to the State and not to the riparian proprietor.

Oregon treats the decision in *Cawlfield v. Smyth* as in effect deciding that a riparian proprietor has no vested right to future relictions, and impliedly at least that the proprietor of the bed has no vested right to retain his lands thus relicted, even if they do not pass to the riparian proprietors.

The language of *Cawlfield v. Smyth*, 69 Or. 41, 46 foot; 138 Pac. 227, 229, c. 1, ft. [1914], is as follows:

> "Concerning this very lake [Malheur] this court, speaking by Mr. Justice Wolverton, in French Livestock Co. v. Springer, 35 Or. 312, 58 Pac. 102, said: 'It is a question of no moment to the parties in the present controversy whether the shore or upland owner takes to the water's edge, or to the center of a non-navigable lake, or what title, if any, has been acquired by reason of such ownership, without reservation in the muniments of the title to the land under the water of the lake, as, in any event, the owner is entitled to all land between the original line and the water's edge, which shall have become bare by accretion or a gradual and imperceptible recession of the

water, not extending beyond the center of the lake.' In good reason there can be no difference in principle between non-navigable lakes and non-navigable rivers respecting recessions and accretions, especially where, as in this instance, both alike rise and fall in the wet and dry seasons."

Again, 69 Or. 49, 138 Pac. 230, c. 1 middle:

"Until legislation of the state has changed its policy on this point, we must hold that the riparian owner of land granted by the general government abutting upon a correctly established meander line is at least entitled to follow the water of the lake or river thus meandered, no matter how far it may recede."

The case of *French Live Stock Co. v. Springer,* 35 Or. 312, 58 Pac. 102 (1899), came here on writ of error and was decided in *French-Glenn Live Stock Co. v. Springer,* 185 U. S. 47 (1902), supra, with *French-Glenn Live Stock Co. v. Colwell,* 185 U. S. 54 (1902).

Oregon starts with the premise that it is the owner of the bed of the lakes and argues that there were no relicted lands to May 24, 1921, and indeed none to the time of the commencement of suit. The argument is that the total recession of the waters within the Meander Line Boundary during many years (with exceptional years) is not permanent, which makes apposite these quotations.

"The word 'permanent' does not mean 'forever' or lasting forever, or existing forever." (Texas & Pacific R. Co. v. City of Marshall, 136 U. S. 393, 402.)

"The term 'permanent' is not the equivalent of 'perpetual' or 'unending' or 'lifelong' or 'unchangeable'." (Soule v. Soule, 4 Cal. App. 97, 105.)

"While a dam is a fairly permanent institution, it is by no means an agency of perpetual existence."

(*Haase v. Kingston Ass'n.*, 212 Wis. 585, 587, 250 N. W. 444, 445, c. 1, par. 2 [1933].)

In the matter of relicted lands the position of Oregon is adverse to the interests of the upland proprietors. The United States has not expressed its views respecting relicted lands, although its interests, if it be the owner of the bed of the lakes or any part, are likewise adverse to any claim of reliction.

It is to the interest of the owner of the bed to maintain that there are no relicted lands and as the plaintiff and, likewise, the defendant claims to be the owner of the bed a case is presented where the parties to the litigation have interests adverse to third persons not impleaded. While a finding of fact upon the point of reliction would not be technically binding upon third parties, in practical effect such a finding might come to the same end. Moreover the case can be decided without reference to reliction. I, therefore, do not find whether or not the recession of the waters is permanent; nor whether or not there are relicted lands.

(6) Are the Grants Made by the United States to Lands Bordering Upon the Meander Line Boundary Comparable in Form to Those Involved in Hardin v. Jordan.

The patents to the uplands in this case are substantially, if not identically, in the form of those involved in *Hardin v. Jordan.* This is not true in respect to school or indemnity lands granted to Oregon by the Act of Admission. In fact, there is no instrument of transfer for the school lands of Oregon. Oregon takes by virtue of the statute upon the approval of the survey involving either a sixteenth or thirty-sixth section. There was no specific grant by the United States of lands bordering on a meander line. The grant was in the abstract.

The muniments of title (if they may be so called) are the Act of Admission and the approved survey. It is usual to file a certified copy of the approved survey in the office of the Recorder of the county wherein the lands involved are located, and of course in the local land office of the United States.

A searcher of records, seeking to satisfy himself respecting the state of the title, would make inquiry in the local land office of the United States to know whether there were any contests or prior rights which interfered with the operation of the statute as a grant of the particular section, the title to which was under consideration.

The same is true in a modified form respecting indemnity lands. There being a deficiency in a sixteenth or thirty-sixth section, the Governor of the State of Oregon would make selection from other land available as lieu land for such deficiency. The lieu land thus selected would be listed to the state without operative words of conveyance and in form found in Appendix 19 in Special Master's Report, Volume 2, which contains a photostatic copy of one of the ten Oregon lists mentioned below. The only indemnity lands on the Meander Line Boundary which Oregon ever owned were 482.10 acres, acquired and disposed of before the commencement of this suit. These indemnity lands were listed in ten approved lists, a summary whereof also constitutes a part of the above Appendix 19.

At the commencement of this suit Oregon did not own any indemnity lands.

The foregoing ends the questions of fact with which we have to deal and we come now to questions of law.

Questions of Law.

(1) Is the Common Law in Respect of the Effect of Conveyances of Lands Bordering on a Meandered Lake (i. e., That the Grantee Takes to the Center of a Lake) in Force in Oregon, or Does the Local Law Provide That the Grantee Takes Only to the Water's Edge.

The common law of England is the law of Oregon (finding III, infra) and the question here is whether the common law has been departed from in respect of the subject here in hand.

This question turns upon rules of conveyancing, not upon rules of property. The question is whether by the law of Oregon dealing with conveyances the grantee of uplands takes to the center of the lake or takes to the water's edge.

Hardin v. Jordan holds that by the common law the grantee takes to the center of the lake.

Kean v. Calumet Canal Co., 190 U. S. 452, says that "the common law, as understood by this court, and the local law of Indiana as to the effect of conveyances bordering on non-navigable waters are the same", i. e., that the grantee takes to the center of the lake and not merely to the water's edge.

Oregon seeks to align herself with Illinois, but there does not seem to be any justification for that endeavor unless it be in the Oregon lake legislation (1917-1931) found in the Amended Answer and Counterclaim and also in the Supplement to this report. The statutes were all enacted subsequent to every patent and grant involved in this case. We assume therefore that the Oregon statutes do not alter the effect of the patents and grants made prior to that legislation and that there is nothing to the contrary in *Great Northern R. Co. v. Sunburst Co.*, 287 U. S. 358, 364. We do not stop to consider the effect or validity of the Oregon legislation operating *in futuro*.

There is no provision in the statutory law of Oregon which in terms deals with the conveyance of uplands bordering upon lakes unless it be found in the legislation pleaded in the Amended Answer and Counterclaim. From earliest times there has been statutory law applicable to streams.

Section 63-102, Oregon Code, Annotated, 1930, Volume 3, page 4868, which has been in force since October 11, 1862, provides, in part, as follows:

> "The following are the rules for construing the descriptive part of a conveyance of real property, when the construction is doubtful, and there are no other sufficient circumstances to determine it: . . .
>
> 4. When a road or stream of water not navigable is the boundary, the rights of the grantor to the middle of the road, or the thread of the stream, are included in the conveyance, except where the road or bed of the stream is held under another title."

In *Caulfield v. Smyth,* quoted supra, page 29, it is said that "in good reason there can be no difference in principle between non-navigable lakes and non-navigable rivers respecting recessions and accretions", and we add that a rule in terms applying to the one would fairly give rise to an implied rule of the same tenor and effect applicable to the other.

Micelli Andrus, 61 Or. 78, 85, 120 Pac. 737, 740, c. 1 foot (1912) says: "The middle line of the latter streams [non-navigable rivers above tide waters] has been determined in this state to be the boundary of a riparian proprietor's land. Shaw v. Oswego Iron Co., 10 Or. 371, 45 Am. Rep. 146. Such, also, is the general rule. Hanlon v. Hobson, 24 Colo. 284, 51 Pac. 433, 42 L. R. A. 502, and notes."

Oregon's statutory law of conveyancing just quoted may fairly justify a ruling that Oregon adheres to the common

law respecting conveyancing and has no rule departing therefrom.

Prima facie, a state which has in terms adopted the common law as a basis for jurisprudence adheres thereto and if a litigant seeks to show that the local rule is a departure from the common law, the burden should be upon him to make the fact clear.

Counsel for Oregon cite only three cases to support the proposition that the local law of Oregon is a departure from the common law in the matter of the interpretation of conveyances of uplands bordering on a non-navigable lake.

The cases cited to the point are those in 35 Or. 312, affirmed by this court in 185 U. S. 47, and 69 Or. 41, neither of which gives countenance to the argument.

Gillihan v. Cieloha, 74 Or. 462, 145 Pac. 1061 (1915), is likewise cited by counsel, but does not seem to give any support to the contention which is made.

I find nothing in the law of Oregon to show that there has been any departure in that State from the common law as announced in *Hardin v. Jordan* and *Kean v. Calumet Canal Co.* (supra), whereunder a grant of uplands in particular form invests the grantee with title from the water's edge to the center of the lake.

If it be suggested that the decision of this question of local law might be postponed to await an authoritative pronouncement by the Supreme Court of Oregon (*Lee v. Bickell,* ..... U. S. ....., 54 S. Ct. 727, 731, c. 2 foot), it is to be said in reply (1) that where there is no pronouncement in the state courts, this court will make its own pronouncement upon the local law, and (2) that in the nature of things the questions here involved must be presently decided and cannot be left at large for or made conditional upon future action of the Supreme Court of Oregon.

(2) If the Common Law as Declared in Hardin v. Jordan is in Force in Oregon, is That Rule Applicable to Lakes of the Character and Size of Malheur and Harney Lakes, or Should They be Held Exceptions and the Rule Declared Inapplicable Thereto.

In *Stewart v. Turney*, 237 N. Y. 117, 123, 142 N. E. 437, 439, 31 A. L. R. 930 (Andrews, J. writing the opinion) it was held that the upland proprietors on Lake Cayuga, 33 miles long and from 1 to 3 miles wide, did not take to the center of the lake but only to some point on the shore. Dealing with the size of the body of water involved, the court said:

> "Were it necessary we would hold, however, that with regard to a grant of land on Cayuga lake an exception should be made to the common-law rule. We are aware of the statement of Judge Bradley in Hardin v. Jordan, 140 U. S. 371, 397, that the Supreme Court does not think the argument ab inconvenienti is sufficient to justify an abandonment of this rule. That to do so is too much like judicial legislation. This is true where the law is clear. Where it is unsettled the result of a proposed rule may turn the scale. So with reference to such a body of water the ordinary rule is so impractical that we give weight to that consideration."

This case is quoted with approval in *Granger v. City of Canandaigua*, 257 N. Y. 126, 130, 177 N. E. 394, 396, c. 1 top (1931).

See, also, *"Lands Under Water in New York"* by Judge Andrews (by whom the decision in *Stewart v. Turney* was written), 16 Cornell Law Quarterly 277 (issue of April, 1931); also *Colson's "Title to Beds of Lakes in New York"*, 9 Cornell Law Quarterly 159, 288 (1923-4); also annotated note *"Title to Beds of Natural Lakes or Ponds"*, 23 A. L. R. 757-799; *Welder v. State* (Tex. Civ. A.), 196 S. W. 868, 870, c. 1 top to 871, c. 2 foot, in which the Supreme Court of Texas refused a hearing; *State v. Grubstake*, 117 Tex. 53, 297 S. W. 202, 205 foot (1927).

See, also, *Richardson v. Sims*, 118 Miss. 732, 80 So. 6 (1918), which assembles all the leading cases on the questions dealt with in *Hardin v. Jordan* and holds that riparian ownership on non-navigable streams should apply to shore owners on navigable lakes.

I do not assume to reach any conclusion on this point but merely call it to the attention of the Court.

(3) If the Rule in Oregon Limits the Grantee to the Water's Edge, Does the Title From the Water's Edge to the Center of the Lake Pass to the State of Oregon or Remain in the United States if and When the Latter Patents or Otherwise Conveys the Upland.

This important question has never been decided by this court, although it has been stated otherwise in argument and decision.

The question baldly stated is this: If the United States (1) owns (a) the upland and (b) the meandered area of a lake and (2) by patent conveys the upland (3) located in a state whereunder local law (as in Illinois) the grantee takes only to the water's edge and not to the center of the lake, (4) is the United States (through or by reason of the patent) divested of title from the water's edge to the center of the lake; and (5) does that title pass to the state (through or by reason of the patent)?

If title in the circumstances stated does pass from the United States to the State, the result is necessarily accomplished (a) by virtue of the intention of the United States (express, implied or imputed) or (b) through the exercised power of the state without the consent of the United States (and forsooth, against its protest and objection).

The transfer of title through the intention of the United States might be made to rest upon (a) an interpretation of the patent, conveyance or other grant, or (b) in the idea of abandonment, i. e., that in making the conveyance of the upland, the United States intended to abandon

ownership of the bed. (The first would make the state a grantee under the patent etc. without however being named therein. The second would involve the problem of vesting the property in the state, following abandonment thereof by the United States.)

The first theory refers us to *Hardin v. Jordan;* the second (abandonment) is pleaded in the Amended Answer and Counterclaim (p. 30, line 7; p. 51, line 4) where it is said that "thereupon and thereby [the patenting of the uplands] the plaintiff, the United States of America, **abandoned** all claim to the" meandered area.

If we assume that the passage of title does not rest upon the intention of the United States it must be concluded that the state acquires the title through forfeiture, namely, a rule that when the owner of upland and meandered area, patents or otherwise grants the upland alone, he forfeits the meandered area to the state.

At the outset it is first important to know what has been decided by this Court upon the subject and just how far the Court has gone and how far it has expressly refused to go, which we proceed now to show.

Hardin v. Jordan, Mitchell v. Smale and *Kean v. Calumet Canal Co.,* supra, dealt with rules for the interpretation of grants according to (a) the common law and (b) the local law whether in conformity therewith (as in Indiana) or a departure therefrom (as in Illinois).

The cases did not involve a rule of property, i. e., the riparian rights of the proprietor of uplands, but merely the question of what property passed by the grant properly interpreted.

The doctrine which underlies *Hardin v. Jordan,* 140 U. S. 371, is summed up in *Oklahoma v. Texas,* 258 U. S. 574, 594-595 (1922) where it is said:

> "Where the United States owns the bed of a non-navigable stream and the upland on one or both sides

> [or the bed of a non-navigable lake and the upland wholly encircling it], it, of course, is free when disposing of the upland to retain all or any part of the river bed [or lake bed]; and whether in any particular instance it has done so is essentially a question of what it intended. If by a treaty or statute or the terms of its patent it has shown that it intended to restrict the conveyance to the upland or to that and a part only of the river bed [or lake bed], that intention will be controlling[1]; and, if its intention be not otherwise shown, it will be taken to have assented that its conveyance should be construed and given effect in this particular according to the law of the State in which the land lies[2]."

"1. *Wilcox v. Jackson*, 13 Pet. 498, 516-517; *Irvine v. Marshall*, 20 How. 558; *Gibson v. Chouteau*, 13 Wall. 92, 99; *Utah Power & Light Co. v. U. S.*, 243 U. S. 389, 404; *Kean v. Calumet Canal Co.*, 190 U. S. 452, 460.

2. *Hardin v. Jordan*, 140 U. S. 371, 384; *Mitchell v. Smale*, 140 U. S. 406, 413-414; *Grand Rapids & Indiana R. R. Co. v. Butler*, 159 U. S. 87, 92; *Hardin v. Shedd*, 190 U. S. 508, 519; *Whitaker v. McBride*, 197 U. S. 510, 512, 515-516; and see *Railroad Co. v. Schurmeir*, 7 Wall. 272, 287, et seq."

Unfortunately, *Hardin v. Jordan* was misunderstood as will later appear, possibly due to the circumstance that it was interpreted as a case involving rules of property and not merely rules for the interpretation of grants. On the other hand, there is a paragraph in *Hardin v. Jordan* which by possibility may account for the error.

The Court said (p. 381):

> "With regard to grants of the government for lands bordering on tide water, it has been distinctly settled that they only extend to high-water mark, and that the title to the shore and lands under water in front of lands so granted **enures to the State** within which they are situated, if a State has been organized and established there."

The word "**enures**" suggests the idea that the state obtained title to the bed of navigable waters as part of a

grant of upland whereas it obtained that title upon its admission into the Union.

The misconception of *Hardin v. Jordan* is of such wide importance that it may be profitable to briefly review the cases. This we do now, even at the expense of some repetition (see supra, pp. 2 to 4, footnote 3).

Hardin v. Jordan, 140 U. S. 371 (1891), held that (a) according to the common law (p. 388, line 11, p. 396, line 16) the grantee of upland under a patent of the United States in particular form (p. 380, line 14, p. 384 near ft.) took to the center of the lake rateably with other riparian proprietors (p. 402, lines 4-9), if there were such; and (b) the rule at common law thus stated prevailed in Illinois (p. 384 ft., p. 388, line 6).

Two years later, *Lamprey v. Metcalf,* 52 Minn. 181, 53 N. W. 1139 (1893), attributed to *Hardin v. Jordan,* 140 U. S. 371 (1891), and its companion case, *Mitchell v. Smale,* 140 U. S. 406 (1891), a holding seemingly not to be found therein, saying (52 Minn. 192, 53 N. W. 1140, c. 2):

> "Grants by the United States of its public lands bounded on streams or other waters, made without reservation or restriction, are to be construed according to the law of the state in which the lands lie; and, consequently, whether the land forming the beds of these lakes belongs to the state, or to the owners of the riparian lands, is a question to be determined entirely by the laws of Minnesota. In support of these propositions, we need only cite Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. Rep. 808, 838, and Mitchell v. Smale, 140 U. S. 406, 11 Sup. Ct. Rep. 819, 840."

Three years thereafter *Fuller v. Shedd,* 161 Ill. 462, 482, last three lines to 490, line 18, 44 N. E. 286, 293, c. 1, line 35, to 295, c. 2, line 32 (1896), held (a) contrary to *Hardin v. Jordan,* that under Illinois law "a grant of land bounded on a meander line conveys only to the water's edge, with riparian rights, but does not include land under the

water"; and (b) that upon such a grant being made by the United States the bed of the lake passed from the United States to the State of Illinois; although (c) it did not decide whether the bed of the lake thus passed from the United States to the State of Illinois (1) under principles or rules of conveyancing; or (2) by abandonment or something of that nature; or (3) by forfeiture or something akin thereto.

Hammond v. Shepard, 186 Ill. 235, 241 top, 57 N. E. 867, c. 2 (1900), held that "shore owners on meandered lakes, whether navigable or non-navigable take title only to the water's edge, the bed of the lake being in the state".

Hardin v. Shedd, 190 U. S. 508 (1903), affirmed the judgment in *Fuller v. Shedd* (and one rendered upon a second appeal in the case reported as *Hardin v. Shedd,* 177 Ill. 123, 52 N. E. 380 [1898]), and held (1) that the local rule of Illinois governed the effect of the grant of upland and (2) did not decide that in the circumstances title passed from the United States to the State. The unusual situation thus presented (of affirmance without decision of what might be assumed the outstanding question) arose from the circumstance that the proceeding in the state court was one *quasi in rem,* "a consolidation of several bills in equity under the Burnt Records Act" (177 Ill. 124, 52 N. E. 380, c. 2 ft.), and there were a number of litigants presenting conflicting claims. The patentees of the United States to the bed of the lake did not sue out the writ of error to this Court and were neither plaintiffs nor defendants in error therein; neither was the United States nor the State of Illinois. The question of whether title passed to the State or remained in the United States, was not only not decided but the question was not involved.

Shedd had brought the proceeding under the Burnt Records Act of Illinois as a holder of patent of the United States to lands bordering on the meander line of a lake, and claimed thereunder title to a portion of the bed.

Mrs. Hardin was also holder of patents of the United States to other lands bordering on the same meander line and claimed title thereunder to a portion of the bed. The claims of Shedd and Mrs. Hardin were in conflict as to the areas within the lake to which they were severally entitled. The other claimants to the bed adverse to Shedd and Mrs. Hardin held patents issued by the United States later in date than the Shedd and Hardin patents.

The state court made a decree determining the validity of all of these claims and held (a) that Shedd and Mrs. Hardin took no title whatever to the bed of the lake as lands granted by their patents; (b) that the later patentees took no title because at the time the United States had none to convey, the title to the bed of the lake having passed to the State of Illinois upon the patenting of the uplands; but held (c) that certain interests in the bed of the lake had accrued to Shedd and Mrs. Hardin under the law of reliction and adjudged the extent thereof.

Mrs. Hardin, and one of her grantees, as owners of the border lots, sued out a writ of error claiming (a) that under *Hardin v. Jordan,* 140 U. S. 371, she acquired title in the bed of the lake not recognized by the state court and (b) that the apportionment of the bed on the basis of reliction awarded an undue area to Shedd.

The patentees of portions of the bed under the later patents from the United States did not prosecute error. (190 U. S. 518 middle, 521 middle.)

This Court held (190 U. S. 520), (a) that the claim of title in the bed of the lake through patents of upland failed but there were rights therein under the law of reliction; (b) that Shedd was entitled to the accretions awarded to him by the state court and (c) nothing more. The decree was affirmed.

Speaking for the Court, Mr. Justice Holmes said (p. 519):

"When land is conveyed by the United States bounded on a non-navigable lake belonging to it, the grounds for the decision must be quite different from the considerations affecting a conveyance of land bounded on navigable water. In the latter case the land under the water does not belong to the United States, but has passed to the State by its admission to the Union. Nevertheless it has become established almost without argument that in the former case as in the latter the effect of the grant on the title to adjoining submerged land will be determined by the law of the State where the land lies. In the case of land bounded on a non-navigable lake the United States assumes the position of a private owner subject to the general law of the State, so far as its conveyances are concerned. . . . When land under navigable water passes to the riparian proprietor, along with the grant of the shore by the United States, it does not pass by force of the grant alone, because the United States does not own it, but it passes by force of the declaration of the State which does own it that it is attached to the shore. The rule as to conveyances bounded on non-navigable lakes does not mean that the land under such water also passed to the State on its admission or otherwise, apart from the Swamp Land Act, but is simply a convenient, possibly the most convenient, way of determining the effect of a grant. We are particular in calling attention to this difference, because we fear that there has been some misapprehension with regard to the point."

In the following portion of his dissenting opinion, Mr. Justice White dealt with a question which this Court had not decided in the foregoing opinion but which had been decided by the Supreme Court of Illinois. He there said (pp. 521-523):

"The Supreme Court of Illinois . . . held that the lot owners by the conveyance to them of lots abutting on the meander line took no title whatever to the bed of the lake. It was, however, decided that the effect of the conveyance by the United States to

private persons of the border lots was to transfer the title of the bed of the lake to the State of Illinois.

. . . .

Now, as the settled rule in Illinois is that under the principles of conveyancing prevailing in that State no title to the bed of a lake passes to the patentees of the United States by the sale of border lots, I do not perceive how the United States has been devested of its title to the bed of Wolf Lake. To say that, although on the principles of conveyancing under the local law, the bed did not pass, nevertheless, because the United States sold the border lots, the State of Illinois thereby became the owner of the bed of the lake, is, as I understand it, to declare that it is in the power of the State of Illinois to appropriate the property of the United States."

Whitaker v. McBride, 197 U. S. 510 (1905), which affirmed *McBride v. Whitaker,* 65 Neb. 137, 90 N. W. 966 (1902), involved land claimed by three persons. McBride and Kilgore were patentees of lands bordering on the Platte River, one on the north and one on the south side. Between these two tracts and in the main channel of the river was an island of which they had been in possession, claiming to own the same by virtue of their riparian positions. Whitaker disturbed their possession and claimed the right to enter the land as a homestead. This gave rise to the dispute.

Neither the United States nor the State of Nebraska was a party to the litigation.

The state court decreed one-half of the island to Kilgore and the other one-half to McBride, and gave judgment against Whitaker as a trespasser.

In its opinion the Supreme Court of Nebraska said (65 Neb. 154, 90 N. W. 972, c. 2):

"It is settled by the decisions of the supreme court of the United States that a grant by the general government of public lands bounded on streams releases the government title to the middle of the stream, unless some reservation is contained in the grant, but whether the title inures to the state in which the land lies, or to the grantee of the government, depends upon the law of the state. Hardin v. Jordan, 140 U. S. 371. As the question of the rights of the state has not been presented in this case, we reserve that question until a case arises in which we may have the benefit of the argument of counsel; it being one of too much importance to be determined without a full discussion. That as against everyone but the state, or those claiming through the state, McBride and Kilgore have the better right to the land in dispute, seems to us too plain for discussion; and that they are entitled to relief as against Whitaker, a naked trespasser on their prior undisputed and peaceable possession, is not a question for debate."

In affirming the judgment below, this Court said (197 U. S. 515):

"It must also be noticed that the Government is not a party to this litigation, and nothing we have said is to be construed as a determination of the power of the Government to order a survey of this island, or of the rights which would result in case it did make such survey. As we reserve the rights of the United States we do not even impliedly sanction the intimation contained in the opinion of the court below that under the decision in Hardin v. Jordan, 140 U. S. 371, although, on non-navigable waters, riparian rights were not conferred by the state law, nevertheless the land beyond the banks passed to the State in virtue of the patents of the United States to the lot owners. Upon that question we express no opinion.

Our conclusion, therefore, is that by the law of Nebraska, as interpreted by its highest court, the

riparian proprietors are the owners of the bed of a stream to the center of the channel; that the Government, as original proprietor, has the right to survey and sell any lands, including islands in a river or other body of water; that if it omits to survey an island in a stream and refuses, when its attention is called to the matter, to make any survey thereof, no citizen can overrule the action of the Department, assume that the island ought to have been surveyed, and proceed to occupy it for the purposes of homestead or preemption entry. In such a case the rights of riparian proprietors are to be preferred to the claims of the settler."

Marshall Dental Co. v. Iowa, 226 U. S. 460 (1913), was on writ of error to review *State of Iowa v. Jones,* 143 Iowa 398, 122 N. W. 241 (1909), which was an action to enjoin the defendants from draining water from Goose Lake, a meandered non-navigable lake, the shore lands of which had been patented by the United States to private proprietors.

The defendant Dental Company claimed title to the lake bed as swamp lands but it was held that the company had no title.

The Supreme Court of Iowa said (143 Iowa 402 middle, 122 N. W. 242, c. 2 top):

"The mere fact, however, that it had no title, will not alone justify restraining defendants from making this improvement. Unless the state has title to or control over the bed of the lake or the water covering it, it may not interfere.

The law is settled in this state that the owner of land bordering on a non-navigable body of water meandered by government surveyors has title to the water's edge, and not to the center of the lake, as is held in some states. . . .

And the Supreme Court of the United States has laid down the rule that this question is peculiarly for the decision of the respective states. . . . In

many states the riparian owner is held to take title in the bed of the lake to its center, and such appears to have been the rule at common law. . . .

The rule in this state, as will appear from the decisions, is well supported by authority, and the inquiry arises, What becomes of the title to the bed of the lake when the riparian owner takes to the water's edge only? Is it retained by the United States, **or does it pass to the state** in which the body of water is located? The question has been raised in this court several times, but never determined." (p. 403.)

[The court then discusses the question, without deciding it (page 403 top to page 409 top), and concludes as follows:]

"It is enough to dispose of the case at bar to decide, as we do, that the state has such an interest in Goose Lake as will support an action to restrain defendants, who are without title, from draining the waters therefrom, or otherwise exercising proprietary control over the same." (p. 409)

In affirming the judgment of the state court, this Court said (226 U. S. 461):

". . . the plaintiff in error shows no title. By the law of Iowa the riparian owners took title only to the water's edge, and therefore the grants of the adjoining land by the United States did not convey the land under the lake. *Hardin v. Jordan*, 140 U. S. 371. *Hardin v. Shedd*, 190 U. S. 508. *Whitaker v. McBride*, 197 U. S. 510, 512. It follows that the bed of the lake either still belongs to the United States **or must be held to have passed to the State.**

The question as to the title to the bed is treated as open in *Hardin v. Shedd*, 190 U. S. 508, 519, and *Whitaker v. McBride*, 197 U. S. 510, 515, and there is no need to decide it now. It is enough to say that by virtue of its sovereignty the State of Iowa has

> an interest in the condition of the lake sufficient to entitle it to maintain this suit against an intruder without title, whether the State owns the bed or not."

Scott v. Lattig, 227 U. S. 229, 243 (1913), held that considering that the stream was navigable the bed thereof passed from the United States to the state upon its admission to the Union and that any conveyance of the bank of that river by the federal government

> "carried with it no right to the bed of the river, save as the law of Idaho may have attached such a right to private riparian ownership. This is illustrated by the statement in Hardin v. Shedd, 190 U. S. 508, 519: 'When land is conveyed by the United States bounded on a non-navigable lake belonging to it, the grounds for the decision must be quite different from the considerations affecting a conveyance of land bounded on navigable water. In the latter case the land under the water does not belong to the United States, but has passed to the State by its admission to the Union. . . . When land under navigable water passes to the riparian proprietor, along with the grant of the shore by the United States, it does not pass by force of the grant alone, because the United States does not own it, but it passes by force of the declaration of the State which does own it that it is attached to the shore.' "

It is clear from the foregoing that this Court has never decided that (a) if the local law limits the patentee to the water's edge, (b) the title from the water's edge to the center of the lake passes from the United States to the state wherein the lands lie (either through or as a result of or at the time of the patent).

It seems clear that the state could not appropriate to herself the lands between the water's edge and the center of the lake against the will or without the consent of the United States.

It is true that the Illinois decisions have held that the bed of non-navigable lakes (the upland being patented

to individuals by the United States) "**belongs**" to the State. In *Schulte v. Warren*, 218 Ill. 108, 75 N. E. 783, 784, col. 2, foot, it is said:

> ". . . in case of a natural lake or bed of water meandered by the government, the grant extends to the water's edge, **while the ownership of the bed of the lake is in the state**, in trust for all the people for the purpose of fishing, boating, and the like." (Citing its earlier decisions to the same effect.)

It is to be noted, however, that it is not here ruled that title passes to the State upon the patenting of the upland to an individual because the language is "the ownership of the bed of the lake **is** in the state", not that the ownership passed from the United States to the state through or by reason of or at the time of the patent.

Wilton v. Van Hessen, 249 Ill. 182, 94 N. E. 134, 136 (1911), puts the doctrine upon two grounds (a) that in meandering a lake the Government "indicates that it is a navigable body of water" and (b) by selling the upland abandons all claim to the bed.

The Court says that the doctrine in that Court is

> "undoubtedly based upon the ground that the federal government by its act in meandering a lake, **indicates** that it is a navigable body of water, **concedes** that the title to the bed of the same **is** in the state, and by selling or otherwise disposing of the surrounding lands as bounded by the edge of the water **abandons** all claim to the bed."

The not even consistent fallacies in this short quotation are at once apparent.

The Wisconsin decisions have been said to be in harmony with the Illinois decisions but this is not wholly true even if substantially true as will be shown by the cases which follow.

In *Ne-Pee-Nauk Club v. Wilson*, 96 Wis. 290, 71 N. W. 661, it is said that "The plaintiff does not own the lake, or the soil under it. It is owned by the state" (citing among other cases, *Hardin v. Jordan*). But it is not stated that title passed from the United States to the state through by reason of or at the time of a patent of upland to an individual.

In a later case, *Mendota v. Anderson*, 101 Wis. 479, 78 N. W. 185 (1899) it is said:

> ". . . It is undoubtedly true that the question whether the title to land, which has once been the property of the United States, has passed, must be resolved by the laws of the United States. Wilcox v. Jackson, 13 Pet. 517; Whitney v. Lumber Co., 78 Wis. 246, 47 N. W. 425, and cases there cited."

In *Whitney v. Detroit Lumber Co.*, 78 Wis. 240, 47 N. W. 425 (1890), the court said:

> ". . . This court has repeatedly recognized the principle 'that whenever the question in any court, state or federal, is whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States'. Wilcox v. Jackson, 13 Pet. 517; Paige v. Peters, 70 Wis. 182, 35 N. W. Rep. 328; Wisconsin Cent. R. C. v. Wisconsin River Land Co., 71 Wis. 99, 36 N. W. Rep. 837."

It will be seen from an examination of the Illinois and Wisconsin cases that they do not say that the state could acquire the meandered area from the water's edge to the center of the lake against the will or even without the consent of the United States. Furthermore it is settled beyond debate by the decisions of this Court that a state cannot through legislation or otherwise acquire any property of the United States against its will or even without its consent. In *Utah Power & L. Co. v. United States*, 243 U. S. 389, 403-404 (1917), it is said:

> "The first position taken by the defendants is that their claims must be tested by the laws of the state in which the lands are situate rather than by the legislation of Congress. . . . . To this we cannot assent. Not only does the Constitution (art. 4, § 3, cl. 2) commit to Congress the power 'to dispose of and make all needful rules and regulations respecting' the lands of the United States, but the settled course of legislation, congressional and state, and repeated decisions of this court, have gone upon the theory that the power of Congress is exclusive, and that only through its exercise in some form can rights in lands belonging to the United States be acquired."

Other decisions of this court to the same effect are collected in the opinion below. (*United States v. Utah Power & Light Co.* [8 C. C. A. 1913], 209 Fed. 554, 557.)

It is to be recalled that in *Oklahoma v. Texas*, 258 U. S. 574, 594, 595, quoted supra, pp. 38, 39, it is said:

> "Where the United States owns the bed of a non-navigable stream and the upland on one or both sides [or the bed of a non-navigable lake and the upland wholly encircling it], *it, of course, is free when disposing of the upland to retain all or any part of the river bed [or lake bed]*;"

If, therefore, the United States is free to dispose of the upland without disposing of the bed and conversely of the bed without the upland, it is not within the power of a state to ordain that if it sells one without the other, the one not disposed of passes (or is forfeited) to the state.

Starting, then, with the premise that the state has no authority to take the lands of the United States (or of its patentees) without the consent of the United States we now stop briefly to consider the question of whether the United States has given its consent to the theory, which Oregon advances, namely, that if the United States patent the upland to an individual and by local law he takes only to the water's edge, then and in that event the State of

Oregon, not mentioned in the grant, takes from the water's edge to the center of the lake. Obviously, there is no rule of conveyancing which would support such an implication and if it is predicated upon the idea that the United States has "abandoned" the area between the water's edge and the center of the lake, as claimed by Oregon, there is less warrant for that argument than for the other, notwithstanding the language which we have just quoted from *Wilton v. Van Hessen*, 249 Ill. 182, 94 N. E. 134, 136 (1911).

It is, therefore, concluded that either by the common law of Oregon a grant of upland gives the patentee to the center of the lake or title to the bed of the lake from the water's edge to the center remains in the United States.

(4) If the Rule in Oregon be That the Grantee Takes to the Center of the Lake, Does That Rule Apply to a School Section to Which Oregon Became Entitled Under the Act of Admission, Effective, However, Only Upon Approved Survey (240 U. S. 210, Lines 1-7) if it be Disclosed That the Section Borders Upon a Meander Line; and is the Rule Applicable to School Sections Equally Applicable to Indemnity Lands Taken in Lieu of Deficiencies in School Sections.

Lands granted under the Act of Admission effective at the moment Oregon came into the Union (although the lands were to be identified and the grant effective *in futuro*) do not come within the ideas underlying the rule of *Hardin v. Jordan*, comprehensively stated in *Oklahoma v. Texas*, supra, pp. 38-39.

I therefore reach the conclusion that lands under the beds of lakes are not to be added to school and indemnity lands bordering on meander lines.

It will be seen under the next point that Oregon acted upon that assumption because she used deficiencies in

fractional school sections bordering on the Meander Line Boundary as base for lieu lands selected by her elsewhere.

The idea of enjoying the deficiency within the meandered area and the right to go from the meandered line to the center of the lake are inconsistent. This is true quite regardless of whether the rule stated in earlier cases that the upland proprietor is merely entitled to complete his subdivision, has been followed in later cases or not. See 140 U. S. 398, second half; also, Note, 23 A. L. R. 757-799, particularly at 788.

This point is or may be of importance to the owners of the 1387.10 acres of school and indemnity lands which border on the Meander Line Boundary for it would affect their right of apportionment.[4] The lands thus affected are: (a) 396.26 acres of school lands either owned or claimed by Oregon; (b) 508.74 acres of school lands once owned by Oregon but sold by her before commencement of suit, and (c) 482.10 acres of indemnity lands likewise owned and sold by Oregon before the commencement of the suit. (See table, supra p. 8; also Finding VIII, infra.) The question, therefore, not only affects Oregon but her successors in interest in respect of the school and indemnity lands aforesaid. (The view here expressed is quite consistent with the idea that the owners of school and indemnity lands have the riparian rights which appertain to uplands generally. *Fuller v. Shedd*, supra,

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4. "Ownership of the bed of lakes and ponds." (Note, 18 L. R. A. 695 [1892]).

"The division of a water front, alluvion, and flats between adjoining riparian owners." (Note, 21 L. R. A. 776 [1893]).

"Rule for apportionment of accretions between riparian proprietors." (Note, Ann. Cas. 1914A, 481).

"Apportionment of Accretions." (Note, 122 Am. St. Rep. 982-988 [1908]).

"Division, in absence of special agreements, of water front, alluvion, and flats between adjoining riparian owners." (Note, L. R. A. 1917B, p. 786).

"Title to beds of natural lakes or ponds." (Note, 23 A. L. R. 757-798 [1923]).

"Division, in absence of special agreement, of water front, alluvion, and flats between adjoining riparian owners." (Note, 25 L. R. A. N. S. 257 [1908]).

p. 40, recognizes this distinction for it holds (161 Ill. 462, syl. par. 5) that "a grant of land bounded on a meandered lake conveys only to the water's edge with riparian rights, but does not include land under the water".)

In *Oklahoma v. Texas*, 258 U. S. 574, 598, it was held that Oklahoma as owner of school lands was "entitled to the same incidents of riparian ownership that any other owner would have". *Frasher v. O'Connor*, 115 U. S. 102, 116, involved indemnity lands. The pertinent act of Congress is quoted to the effect that the lists "shall be regarded as conveying the fee simple of all of the lands embraced in such lists". This Court said "that the title of the state to the lands thus became as complete as though transferred by a patent of the United States". All this is quite consistent with the point taken, i. e., that as a matter of conveyancing the transfer of title of school and indemnity lands bordering on a meander line carries no part of the bed of a lake thus meandered although good title passes with all riparian rights attached.

(5) If Fractional Sections of School Lands Border Upon a Meandered Lake and the State Uses the Deficiency Within the Meandered Lake as Base for Lieu Lands is the State Also Entitled to the Benefit of the Rule of Hardin v. Jordan.

Finding VIII, infra, says:

> Oregon used as base certain lands within the Meander Line Boundary constituting deficiencies in three Sections 36. The amount of base thus taken (which was taken for and used elsewhere) was 158.92 acres in Section 36:25:32 (North of Malheur Lake) in Malheur Lake Division; 96.66 acres (104.18 acres available, less 7.52 acres not utilized) in Section 36:26:33 in Malheur Lake Division, and 67.37 acres in Section 36:26:29, Harney Lake Division.

The fractional thirty-sixth sections were two in Malheur Lake Division and one in Harney Lake Division.

At the commencement of this suit Oregon owned no land bordering on the Meander Line Boundary of the Malheur Lake Division but did own (by undisputed title) 172.63 acres of school land bordering on the Meander Line Boundary of the Harney Lake Division and this acreage is a part of the same section in respect whereof Oregon took the above 67.37 acres as base for lieu lands.

Appendix 18 (Report of Special Master, Vol. 2, page 96) contains a diagram of this section showing the fractional nature thereof, and also indicating the 67.37 acres within the meander line which Oregon used as base for lieu lands (see inset facing p. 70, infra).

Oregon thereby gave a construction to the Act of Admission and of her rights thereunder (the right to use base in the meandered area for lieu lands to be elsewhere selected) and can not now claim that the fraction of the same section bordering on the meander line gave rise to rights under *Hardin v. Jordan*. Indeed, cases are supposable where in practical effect the claim of deficiency within a meandered line would afford greater area than that obtainable under *Hardin v. Jordan* and in instances reach the opposite shore.

(6) Are the Statutes Pleaded in Haec Verba in the Amended Answer and Counterclaim (Also set out in Supplement, Infra, pp. vi to xiv) Effective to Give Oregon Title to the Lands Within the Meander Line Boundary, or to any Thereof.

The following General Laws of Oregon are pleaded *in haec verba* in the Amended Answer and Counterclaim, and are also set out in the Supplement to this Report, infra, pp. vi to xiv. They are as below, the effective date in each instance being given:

Ch. 278, 1917, page 518, May 21, 1917;
Ch. 280, 1921, page 521, May 24, 1921;
Ch. 282, 1923, page 435, May 23, 1923;
Ch. 228, 1931, page 358, June 4, 1931.

These Acts provided in matters pertinent to the questions involved as stated below.

The Act of 1917.

The Act of 1917 deals with navigable lakes; provides that the title to the beds is vested in Oregon if it has not become vested in another, and declares that there shall be no title acquired thereafter in any part of the beds "by reliction or otherwise" except as provided by law.

The Act of 1921.

"Section 1. Any and all lakes wholly or partially within the state of Oregon which have been meandered by the United States surveys, are hereby declared to be navigable and public waters, and the waters thereof are hereby declared to be of public character, and the title to the bed and land thereunder, including the shore or space between ordinary high and low water marks and between ordinary high and low water lines, which are not included in the valid terms of a grant or conveyance from the state of Oregon, is hereby declared to be in the state of Oregon, and the state of Oregon hereby asserts and declares its sovereignty over the same and its ownership thereof; . . .

"Section 2. Nothing in section 1 of this act shall be construed as impairing the title of any upland or riparian owner or owners to or any **vested** rights in land which has **heretofore been added** by natural accretion or reliction to the lands of such upland owner or owners."

"Section 3. It is hereby declared that there is and **shall hereafter be no vested rights in or to any future accretion or reliction** to the lands of any upland or riparian owner or owners on any such lake or public waters and after this act takes effect no person, firm or corporation shall acquire any right, title or inter-

> est in or to the beds of any such public waters or any part thereof, by reliction, accretion or otherwise, . . . Lands which are covered at ordinary high water at ordinarily recurring seasons by the waters of any such lakes or public waters as defined in section 1 of this act, or from which the waters of any such lakes or public waters have not at ordinarily high water **permanently** receded, shall not be deemed or held to be accreted or relicted lands, but the same and all accretions and relictions hereafter occurring or formed over any of the lands of the state of Oregon, as hereinbefore provided, shall be and remain the property of the state of Oregon, and may be by it leased, demised, sold or disposed of in the manner now or hereafter provided by law."

The Act of 1923.

The Act of 1923 secures to upland proprietors in given conditions the privilege of filling out the least fractional subdivision or subdivisions owned by them and specifically accords the privilege (Section 1, subsection [c]) to "the owners of land riparian to Malheur Lake and Mud Lake, in Harney County, Oregon".

The Act of 1931.

Section 1, subsection (h) of the Act of 1923, as amended in 1931, provided as follows:

> "In the event that the federal government claims title or interest in any such lake-bed lands, . . . the state land board is hereby authorized and empowered to enter into such agreements with the federal government affecting such lands as it deems best in the interest of the public [and make exchanges], . . . provided, however, that nothing herein contained shall be construed as a recognition of any title or interest in the United States of America below or within the meander lines of any meandered

lake to any lands or waters of any such lake prior to the execution and delivery of a deed or conveyance from the state of Oregon, . . ."

It is plain that by these statutes Oregon declares herself the owner of the beds of all non-navigable lakes in Oregon excepting "vested rights" in lands "heretofore" added by reliction to upland acreage. The legislation does not mention "non-navigable" lakes, but "all lakes" "which have been meandered by the United States surveys". Oregon claims in this suit, moreover, that the legislation applies to non-navigable lakes.

It is needless to say that as Oregon, upon its admission to the Union, became the owner of all navigable lakes, she has always been free in respect thereof subject to public rights.

Non-navigable lakes present an entirely different question. The beds of these lakes remained the property of the United States. By her legislation Oregon would take over from the United States the ownership of the beds even if no disposal of the uplands had ever been made by the United States.

It is true that Oregon also claims that it possesses this right (perhaps in the alternative) if the United States has disposed of a material part of the upland. (The United States has disposed of 79.80% of the frontage, including school and indemnity lands, on the Malheur Lake Division, and 100%, including indemnity lands, on the Mud Lake Division. There are no school lands bordering on that division.)

The legislation is not conditioned upon the disposal of a material part of the upland by the United States but applies to all meandered lakes within the state *ex proprio vigore* whether owned by the United States or its successors.

Oklahoma undertook to declare all streams two chains in width navigable but was unsuccessful for this Court did not mention the statute. (*Oklahoma v. Texas*, supra.)

Oregon seeks by the above legislation to appropriate (without compensation) the beds of all non-navigable meandered lakes through the medium of declaring them to be "navigable and public waters".

This legislation is supposed to be based upon observations in some decisions of this and other courts, but these do not seem to justify any such legislation. Moreover, the remarks upon which Oregon sets reliance had to do with a declaration that a particular body of water was navigable and/or public. Here, there is a legislative declaration of navigability in respect of many bodies of water which are not only confessedly non-navigable but the non-navigability of some of which abstractly this Court might feel free to take notice.

> "We cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men." (Mr. Justice Field in Ho Ah Kow v. Nunan [1879], Fed. Case No. 6546, 12 Fed. Cases 252.)

In conformity to the requirements of the Act of Admission Oregon on June 3, 1859 ordained that it "would never interfere with the primary disposal of the soil within the same by the United States" which, however, was merely "declaratory" and conferred "no new right or power upon the United States" (*Gibson v. Chouteau*, 13 Wall. 92, 99).

The legislation of Oregon as construed by her in this case would seem to be a clear violation of the quoted provision (and the antecedent rights of the United States of which the provision was merely "declaratory") i. e., because it is an undue interference with the power of the

United States to dispose of her own lands (a) through the appropriation by Oregon of the title of the United States to beds of non-navigable lakes, thereby rendering impossible disposal thereof by the United States, and (b) (in the alternative) by providing that if the United States disposes of a material part of the uplands along a meandered line it is within the power of the State by fiat to declare herself to be the owner of the meandered area. This authority is not predicated upon an intention to be imputed to the United States. Oregon thus claims in effect that it may "take from the United States their own land, against their own will, and against their own laws" (*Wilcox v. McConnel,* 13 Pet. 496, 515-516; *Gibson v. Chouteau,* 13 Wall. 92, 99), thereby "placing the public domain of the United States completely at the mercy of state legislation". (*Camfield v. United States,* 167 U. S. 518, 524-526.) No state can acquire property of the United States by legislative fiat. (*Van Brocklin v. Tennessee,* 117 U. S. 151, 164-165.) The authority of a state over property of the United States must be found in the Constitution of the United States or in consent of Congress.

To this point we call attention again to the following authorities cited and quoted under Point (3):

In *Utah Power & L. Co. v. United States,* 243 U. S. 389, 403-404 (1917), it is said:

> "The first position taken by the defendants is that their claims must be tested by the laws of the state in which the lands are situate rather than by the legislation of Congress. . . . To this we cannot assent. Not only does the Constitution (art. 4, § 3, cl. 2) commit to Congress the power 'to dispose of and make all needful rules and regulations respecting' the lands of the United States, but the settled course of legislation, congressional and state, and repeated decisions of this court, have gone upon the theory that the power of Congress is exclusive, and

> that only through its exercise in some form can rights in lands belonging to the United States be acquired."

An abundance of authority upon this point will be found in the decision of that case below. (*United States v. Utah Power & Light Co.* [8 C. C. A. 1913], 209 Fed. 554, 557.)

It is to be recalled that in *Oklahoma v. Texas*, 258 U. S. 574, 594, 595, quoted supra, pp. 38, 39, it is said:

> "Where the United States owns the bed of a non-navigable stream and the upland on one or both sides [or the bed of a non-navigable lake and the upland wholly encircling it], *it, of course, is free when disposing of the upland to retain all or any part of the river bed [or lake bed];*"

If, therefore, the United States is free to dispose of the upland without disposing of the bed and conversely of the bed without the upland, it is not within the power of a state to ordain that if it sells one without the other, the one not disposed of passes (or is forfeited) to the state.

All of the claims advanced by Oregon in this suit are set out in findings XV and XVI, infra. (See particularly subdivisions (f) and (i) in finding XV, infra.)

(7) Was the Executive Order of August 18, 1908, Valid as and From That Date.

The State of Oregon claims that the Executive Order of August 18, 1908, is invalid because there was no authority for the issuance of such an Order until the treaty with Canada was proclaimed by the President on December 8, 1916 (39 Stat. 1702), and the effective date of the Migratory Bird Treaty Act approved July 3, 1918. (c.

128, 40 Stat. 755.) (The validity of the 1918 Act was sustained in *Missouri v. Holland*, 252 U. S. 416, 435.)

It is clear, however, that the Executive Order of August 18, 1908, was valid at the date of its promulgation. (*United States v. Midwest Oil Co.*, 236 U. S. 459, 466, 470.)

In "An Act to Protect Birds and their Eggs in Game and Bird Preserves" June 28, 1906, c. 3565, 34 Stat. 536, it is made a misdemeanor for any person to hunt, trap, wilfully disturb, or kill any bird of any kind whatever or take the eggs of such birds on any lands of the United States which have been set apart or reserved as a breeding ground for birds by any law, proclamation, or executive order, except under such rules and regulations as may be prescribed from time to time by the Secretary of Agriculture.

See, also, Act of March 4, 1913, c. 145, 37 Stat. 847; and the Act of February 18, 1929, c. 257, Section 10, 45 Stat. 1222, 1224.

(8) Did the School Lands (62.76 Acres Bordering on the Sand Reef Division and 160.87 Acres (20.27 Acres Plus 140.60 Acres) on the Harney Lake Division), the Surveys Whereof Were Approved Subsequent to the Executive Order, August 18, 1908, Pass to Oregon or are They Still the Property of the United States (United States v. Morrison, Supra).

The surveys of these lands were approved subsequent to the Executive Order of August 18, 1908. If the Executive Order is valid from its date these school lands did not pass to Oregon and are still the property of the United States. (*United States v. Morrison*, supra.)

(9) In View (1) of the Absence From the Case as Parties of (a) the Upland Proprietors and (b) the "Settlers" Within the Meander Line Boundary, and That (2) Oregon Takes Positions Inconsistent With Claims That They Might be Expected to Make, how far Should the Court Proceed in the Making of a Decree Without Their Presence.

Ordinarily, a court of equity would be disposed to bring in the upland proprietors and the settlers, but that would turn the litigation into a suit seemingly inappropriate for this Court although there would be no jurisdictional objection thereto inasmuch as in a suit against a state "an individual citizen [of that state] may be made a party where relief is properly sought as against him" (*Kentucky v. Indiana*, 281 U. S. 163, 173 foot).

There are some questions of importance which, moreover, can be settled between the United States and Oregon in this litigation without the presence of (a) the upland proprietors and/or (b) the "settlers". Chiefly these questions are (1) whether the United States or the State of Oregon is the source of title of the area involved in view of the claim that the waters were navigable at the admission of Oregon into the Union; and (2) whether by its statutory law Oregon has succeeded to the title of the United States to the beds of the lake *ex proprio vigore*.

It is also necessary to decide (without binding the "upland proprietors" or "settlers") as between the United States and the State of Oregon, whether the common law of Oregon is the same as Illinois or as Indiana. This is a point upon which the interests of the upland proprietors and the settlers, and vice versa, may not be the same, although in first impression they would be both interested in having it declared that the common law of Oregon is the same as that of Indiana. The patents, etc. of the upland proprietors would thereby take them to the center of the lake, and it would be open to the settlers to claim title by prescription against the upland proprietors, whereas that would not or might not be true

if the meandered area was owned by a sovereign, federal or state.

It would seem appropriate to decide the above questions and connected questions as far as may be and to leave the controversy with (a) the upland proprietors and (b) the "settlers" to be determined in later litigation either in the federal courts for Oregon or in the state courts.

In *Wood v. Dummer*, 3 Mason 308, 30 Fed. Cas. 435 (1824), Mr. Justice Story said (p. 438, col. 2):

> "The general rule is, that all persons materially interested, either as plaintiffs or defendants, are to be made parties. There are exceptions, just as old and as well founded, as the rule itself. Where the parties are beyond the jurisdiction, or are so numerous, that it is impossible to join them all, a court of chancery will make such a decree, as it can, without them. Its object is to administer justice, and it will not suffer a rule, founded in its own sense of propriety and convenience, to become the instrument of a denial of justice to parties before the court, who are entitled to relief. What is practicable to bring all interest before it, will be done. What is impossible or impracticable, it has not the rashness to attempt, but it contents itself with disposing of the equities before it, leaving as far as it may, the rights of other persons unprejudiced."

(10) Is There Anything in the Case Which Requires the Application of the Rule That a Plaintiff in a Suit to Quiet Title Must Recover Upon the Strength of his own Title and not Upon the Weakness of the Title of the Defendant.

In suits to remove a cloud on title and in ejectment the rule is universal that the plaintiff must recover upon the strength of his own title and not upon the weakness of the title of the defendant. (*Doolan v. Carr*, 125 U. S. 618, 629 [1887]; *Dick v. Foraker*, 155 U. S. 404, 414 [1894]; *Filhoil v. Torney*, 194 U. S. 356, 360 [1904]; *Dumbar v. Green*, 198 U. S. 166, 168 [1905] and *McGuire vs Blount*, 199 U. S. 142, 144 [1905].)

See, also, for innumerable cases (federal and state) under "Quieting Title", 51 *Cor. Jur.*, p. 171, § 73 and p. 247, § 224.

In this case it would seem that the United States may be properly awarded a decree that it once owned all the area involved and still is the owner thereof except as to such portions as have been granted under the Act of Admission or by patent. The "grants" of the United States are all matter of public record.

There are objections to this form of decree generally (1 *Freeman on Judgments*, 5th Ed. p. 96; *De Sepulveda v. Baugh*, 74 Cal. 468), but, perhaps the unique requirements of the case may call for an exception if one be needed.

In *Rhode Island v. Massachusetts*, 14 Pet. 210, 257, this Court said: "In a controversy [between] two sovereign states . . . it will be the duty of the court to mould the rules of chancery practice and pleading, in such a manner as to bring this case to a final hearing on its real merits." See, also, *Virginia v. West Virginia*, 220 U. S. 1, 27, where it is said: "We shall spend no time on objections as to multifariousness, laches, and the like, except so far as they affect the merits." In *United States v. Utah*, 283 U. S. 800, 803 foot, the defendant is enjoined from asserting title "to said river bed, or any part thereof, adverse to the United States of America, or its grantees" (presumably before suit brought).

Moreover, the interest of the United States at the time of the commencement of the suit is sufficient to support an appropriate decree under the most rigid rule.

Again, it will be permitted on its own behalf, and on behalf of its grantees, to obtain a decree against Oregon as to the basic facts upon which the validity and sufficiency of its grants would depend.

Indeed, there are numerous cases where grantors of lands have been permitted to maintain suits to quiet title to enure to the benefit of their grantees upon one set of circumstances or another, the underlying spirit of which might very well justify the application of that rule to the circumstances of this case.

Summary.

The Five Divisions.

1. The five divisions involve 81,786 acres of unsurveyed land including the tract of 115.92 acres mentioned in findings VI and VII, infra, all within the Meander Line Boundary and divided for the purposes of the case into five divisions: (1) Malheur Lake; (2) Narrows; (3) Mud Lake; (4) Sand Reef and (5) Harney Lake.

2. At the time of the admission of Oregon into the Union February 14, 1859 (a) the entire area involved, (b) the area within the Executive Order boundary and (c) all of the region thereabouts was owned by the United States.

3. As no part of the area involved constituted navigable waters on that day no part thereof passed from the United States to the State of Oregon upon the admission of the latter into the Union.

4. At the admission of Oregon into the Union there were stable lands constituting islands or promontories within the area involved and all lands above the water surface elevation of 4093 on that day were stable lands and ever since have been and now are owned in fee simple absolute by the United States (except stable lands within the Narrows Division, if any, the occasion for the exception appearing below).

5. The United States has never disposed of any part of the area involved (in terms); nor at all, except such disposition as may have resulted (as matter of law) from patents, grants and listing of lands bordering on the Meander Line Boundary.

6. The Decree in this case should expressly reserve the rights of third persons not parties to this suit.

7. Determination of ownership of the area involved should be subject to such easements as exist for the flow of waters from one subdivision to another or others.

The Malheur Lake Division.

1. Prior to the commencement of this suit the United States had disposed of upland bordering on the Malheur Lake Division, the frontage whereof on the meander line amounted to 79.80% of the entire frontage for that division, and had retained and owned at the commencement of this suit lands bordering on the same line the frontage whereof represented 20.20% of the frontage. Of the 79.80% of the frontage thus disposed of by the United States 1.34% was of school land granted to and sold by Oregon before commencement of suit; 4.80% of indemnity lands listed to and sold by Oregon before the commencement of suit and 73.66% of patented land.

2. Taking as premises (a) that Malheur Lake does not give rise to an exception to the rule in *Hardin v. Jordan*, and (b) that the common law as understood by this Court is the common law of Oregon, it is not necessary and it would be inappropriate in the absence of the only persons interested therein (the successors in interest of the State of Oregon of school and indemnity land) adversely to the United States to determine whether in a rateable partition of the bed of the lake among upland proprietors the above percentage of 1.34% and 4.80% should be taken by the owners of the upland school and indemnity lands or by the United States.

3. In any event the United States is the owner of 20.20% (or some equitable approach thereto) of the bed of Lake Malheur held in common with owners of upland.

4. Oregon has no claim whatever in the Malheur Lake Division and the United States is entitled to a

decree to the foregoing effect and quieting its title and the title of its grantees against the State of Oregon to all interest in the Malheur Lake Division.

The Narrows Division.

The Narrows Division is divided into subdivisions A and B; subdivision A constitutes that portion thereof from the Bridge easterly to the Malheur Lake Division, and subdivision B from the Bridge westerly to the Mud Lake Division. Both subdivisions have the configuration of a stream and are dealt with upon that basis.

Subdivision A:

The lands bordering on both banks of subdivision A are made up of indemnity lands and patented lands. The indemnity lands bordering on both banks of subdivision A afford 14.64% and the patented lands 36.52% of the frontages on both subdivisions A and B. The question presented in the Malheur Lake Division respecting indemnity lands does not apply in either subdivision A or subdivision B of the Narrows for the areas therein are to be treated as a stream, and by the terms of the Act of May 18, 1796 (1 Stats. 464) now embodied in R. S. §2476, it is provided that:

> "... in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both." (United States Compiled Statutes, 1918, page 743, §4918).

Therefore the upland proprietors in subdivision A of the Narrows own the bed and banks within the meander lines of that subdivision of the Narrows Division.

This renders it unnecessary to consider the force and effect of Section 63-102, Oregon Code Annotated, 1930, supra, page 34, which might become pertinent if it were held that the grantee of indemnity lands does not take the benefit of the rule in *Hardin v. Jordan.*

Neither the United States nor the State of Oregon has any interest in subdivision A of the Narrows Division (between the Bridge and the Malheur Lake Division) except that the United States has or may have an easement whereby the waters of Malheur Lake may pass.

Subdivision B:

Prior to the commencement of this suit the United States had disposed of all of the land bordering on the meander line on both sides of the stream between the Bridge and Mud Lake. These lands constituted (a) patented lands and (b) indemnity lands which had been listed to Oregon and sold prior to the commencement of suit.

The frontages of these lands within subdivision B were as follows: (a) patented lands 41.07%, and indemnity lands 7.77% of the total frontage in subdivisions A and B.

Oregon owns a portion of the patented lands having acquired them through foreclosure (supra p. 10) but does not own any part of the indemnity lands.

For the reasons given under subdivision A, the United States has no interest whatever in the bed or banks of the Narrows Division between the Bridge and Mud Lake Division, except that it has or may have an easement whereby the waters of Malheur Lake may pass.

Oregon has an aliquot part of the bed and banks thereof corresponding to the frontage owned by it thereon.

The Mud Lake Division.

The United States had before the commencement of this suit disposed of all lands bordering on the Mud Lake Division. The frontage of the patented lands (Oregon holds a portion of these patented lands as successor in interest of original patentees) is 67.60% and that of the indemnity lands 32.40%.

The frontage of lands on Mud Lake is 806.94 chains of which 261.47 chains represent indemnity lands and 72.31 chains represent patented land owned by Oregon and 473.16 chains patented land owned by individuals.

Oregon is entitled to a rateable portion of the bed of Mud Lake as 72.31 chains bears to 806.94 chains allowing for equitable considerations which may affect this ratio.

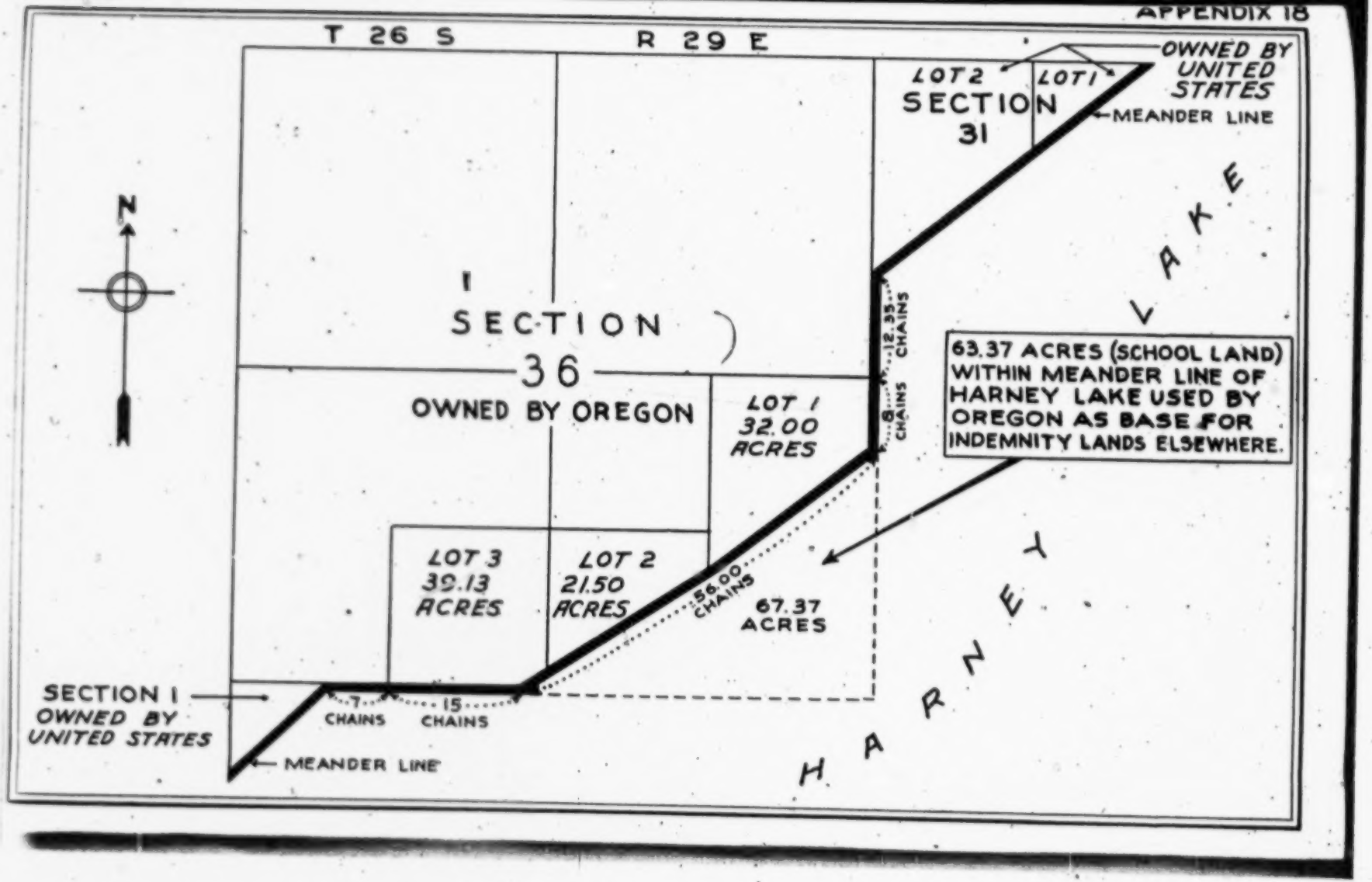
It is unnecessary and inappropriate to decide in the absence of the owners of indemnity lands bordering on Mud Lake, whether they are or may be entitled to participation in the partition of the bed of Mud Lake to the extent of such a proportion as 261.47 would bear to 806.94 or whether that percentage of the lake should be allotted to the United States. The Decree here would not bind them nor inure to their benefit.

The Sand Reef Division.

The United States at the time of the commencement of this suit owned lands bordering on the Sand Reef Division, the frontage whereof constituted 84.92% of the entire frontage. 4.90% is made up of the frontage of two parcels bordering on the Sand Reef Division owned by individuals, i. e., Lot 5, Section 4, T. 27 S., R. 30 E. (south of Malheur Lake), containing 41.84 acres, patented to Aaron Farnsworth April 3, 1913, upon a homestead entry initiated September 23, 1907, and Lot 5, Section 8, same township and range, containing 37.30 acres, patented to Armenious C. Lynch September 16, 1912, upon a homestead entry initiated December 20, 1906.

10.18% is either owned or claimed by Oregon. This 10.18% represents a frontage of 62.76 acres claimed as school land under survey approved after the Executive Order of August 18, 1908.

It is conceded by Oregon that if the Executive Order was valid as of that date, Oregon does not own title to the 62.76 acres.


T 26 S
R 29 E
LOT 2
LOT 1
SECTION 31
OWNED BY UNITED STATES
MEANDER LINE
N
SECTION 36
OWNED BY OREGON
LOT 1 32.00 ACRES
LOT 3 32.13 ACRES
LOT 2 21.50 ACRES
67.37 ACRES
12.35 CHAINS
8 CHAINS
56.00 CHAINS
63.37 ACRES (SCHOOL LAND) WITHIN MEANDER LINE OF HARNEY LAKE USED BY OREGON AS BASE FOR INDEMNITY LANDS ELSEWHERE.
HARNEY LAKE
SECTION 1
OWNED BY UNITED STATES
7 CHAINS
15 CHAINS
MEANDER LINE

As it is held that the Executive Order was valid as of its date, the United States owns all of the Sand Reef Division within the Meander Line Boundary except such as may belong to the two patentees aforesaid as their successors whose rights will not be adjudged herein in their absence.

The Harney Lake Division.

Prior to the commencement of this suit the United States had disposed of lands bordering on the Meander Line Boundary of the Harney Lake Division, the frontage of which constituted 12.09% of the entire frontage, whereof 1.10% represented the frontage of one tract bordering on the meander line of the Harney Lake Division, namely, Lot 5 in Section 2 of Township 27 South, Range 29 East, containing 46.11 acres, which was patented by the United States June 13, 1910, to John C. Clement under a homestead entry made April 6, 1907.

The remaining 10.99% is made up of (a) 5.12% representing the frontage of 172.63 acres, (b) 1.06% the frontage of 20.27 acres, and (c) 4.81% the frontage of 140.60 acres, all school lands. The 20.27 acres and the 140.60 acres were upon surveys approved after the Executive Order and Oregon has no title thereto if the Executive Order be valid as of August 18, 1908.

If the grant were valid the question would still remain whether the rule of *Hardin v. Jordan* applies to school land.

The remaining 172.63 acres of school land passed to Oregon under a survey approved before the Executive Order but there are two reasons why this tract of 172.63 acres is not entitled to a rateable participation in the bed of Harney Lake. They are these: (a) that school lands do not take the benefit of the rule in *Hardin v. Jordan,* and (b) that in any event as shown by Appendix 18 (Report of Special Master: Vol. 2, p. 96) Oregon took

deficiency within the meander line in respect of a Section 36 whereof the above 172.63 acres was a part, for use as lieu land elsewhere and cannot claim the benefit of the rule of *Hardin v. Jordan.*

From the foregoing it follows that the United States is the owner of all the interests in Harney Lake Division except the interest of the above patentee, John C. Clement, or his successors which it would not be appropriate to determine in his absence.

Accompanying this report are findings of fact and conclusions of law and a recommended form of decree whereon with the matters hereinbefore set forth in this report, the foregoing conclusions have been reached.

Respectfully submitted,

GARRET W. MCENERNEY,
Special Master.

San Francisco, July 28, 1934.

FINDINGS.

I.

The United States became the undisputed sovereign owner of the territory along the Pacific Ocean between the forty-second and forty-ninth parallels (including the present States of Oregon and Washington) by the settlement of the Northwest boundary dispute with Great Britain in 1846.

On August 15, 1846, during the war with Mexico, California, then of undetermined boundaries, was declared to be a territory of the United States (see *United States v. Yorba* [1863], 1 Wall. 412) and later ceded to the United States by Mexico under the treaty of Guadalupe Hidalgo February 2, 1848. In 1850 it was admitted to the Union with its present limits between the parallels of 32° 40′ and 42° north latitude.

On August 14, 1848, the Oregon Territory was formed, extending from the northern boundary line of California to the forty-ninth parallel (now the northern boundary line of the State of Washington and of the United States), and from the Rocky Mountains to the Pacific. (9 Stat. 323.) In *Shively v. Bowlby*, 152 U. S. 1, 50 (1894), it is said:

> "The title of the United States to Oregon was founded upon original discovery and actual settlement by citizens of the United States, authorized or approved by the government of the United States, as well as upon the cession of the Louisiana Territory by France in the treaty of 1803, and the renunciation of the claims of Spain in the treaty of 1819. Am. St. P., 6 Foreign Relations, 666; Barrow, Hist. Oregon, c. 22; 8 Stat. 202, 256. While the right to Oregon was in contest between the United States and Great Britain, the citizens of the one and the subjects of the other were permitted to occupy it under the conventions of 1818 and 1827. (8 Stat. 249, 360.) Its

boundary on the north was defined by the treaty with Great Britain of June 15, 1846. (9 Stat. 869.) So far as the title of the United States was derived from France or Spain, it stood as in other territories acquired by treaty. The independent title based on discovery and settlement was equally absolute. *Johnson v. McIntosh,* 8 Wheat. 543, 595; *Martin v. Waddell,* 16 Pet. 367, 409; *Jones v. United States,* 137 U. S. 202, 212, 11 Sup. Ct. 80.

"By the act of 1848, establishing the territorial government of Oregon, 'all laws heretofore passed in said territory making grants of land, or otherwise affecting or incumbering the title to lands,' were declared to be void and the laws of the United States were 'extended over and declared to be in force in said territory, so far as the same, or any provision thereof, may be applicable.' Act Aug. 14, 1848, c. 177, § 14. (9 Stat. 329.)"

II.

By the Act of February 14, 1859 (11 Stat. 383, Chap. 33), Oregon was admitted into the Union with boundaries as shown on "Exhibit A" to the Bill of Complaint which is a Map of the State chiefly compiled from the official records of and made in the General Land Office. Section 5 of the Act provided that:

". . . until Congress shall otherwise direct, the residue of the Territory of Oregon shall be, and is hereby incorporated into, and made a part of the Territory of Washington."

The Act also provided:

". . . the following propositions be and the same are hereby offered to the said people of Oregon for their free acceptance or rejection, which, if accepted, shall be obligatory on the United States and upon the said state of Oregon, to wit: First, That sections numbered sixteen and thirty-six in every township of

public lands in said state, and where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said state for the use of schools. . . . Fifth, . . . provided, that the foregoing propositions, hereinbefore offered, are on the condition that the people of Oregon shall provide by an ordinance, irrevocable without the consent of the United States, that said state shall never interfere with the primary disposal of the soil within the same by the United States, or with any regulations congress may find necessary for securing the title in said soil to bona fide purchasers thereof; and that in no case shall nonresident proprietors be taxed higher than residents. Sixth, And that the said state shall never tax the lands or the property of the United States in said state: . . ."

The provisions of the Act were accepted by the Legislative Assembly of the State of Oregon by Act approved June 3, 1859 (1 Lord's Ore. Laws, pp. 28, 29), Section 1 whereof read as follows:

"Propositions of Congress accepted.—That the six propositions offered to the people of Oregon in the above-recited portion of the act of Congress aforesaid be, and each and all of them are hereby, accepted; and for the purpose of complying with each and all of said propositions hereinbefore recited, the following ordinance is declared to be irrevocable without the consent of the United States, to wit:

"*Be it ordained by the legislative assembly of the state of Oregon,* That the said state shall never interfere with the primary disposal of the soil within the same by the United States, nor with any regulations congress may find necessary for securing the title in said soil to the *bona fide* purchasers thereof; and that in no case shall nonresident proprietors be taxed higher than residents; and that the said state shall never tax the lands or property of the United States within said state."

The above provisions which relate to school lands were dealt with in *United States v. Morrison,* 240 U. S. 192 (1916).

III.

The organic law of the provisional government of Oregon passed June 27, 1844, contained the following provision:

> ". . . the common law of England and principles of equity, not modified by the statutes of Iowa or of this government, and not incompatible with its principles, shall constitute a part of the law of this land." (Laws of Oregon, 1843-49, p. 100.)

The foregoing law was in force when the Constitution of Oregon adopted September 18, 1857, became effective February 14, 1859 (128 Or. 510, 275 Pac. 53, c. 2 middle) and has so remained to this time. Article 18 of the Constitution as adopted and still in force, provides:

> "All laws in force in the territory of Oregon when this Constitution takes effect, and consistent therewith, shall continue in force until altered or repealed."

These provisions are cited in: *Peery v. Fletcher,*[1] 93 Or. 43, 53 (1919); *United States F. & G. Co. v. Bramwell,*[2] 108 Or. 261, 264 (1923); *In re Hood River,*[3] 114 Or. 112, 166 (1924) and *Lytle v. Hulen,*[4] 128 Or. 483, 510 (1929).

IV.

All lands hereinafter referred to lie within the region which now constitutes Harney County in the State of Oregon. The area constituting Harney County as shown on Exhibit "A" to the Bill of Complaint was within the

1. 182 Pac. 143, 146, col. 2.
2. 217 Pac. 332, 334, col. 1.
3. 227 Pac. 1065, 1082, col. 2.
4. 275 Pac. 45, 53, col. 2.

boundaries of the Territory of Oregon from its organization in 1848, until the admission of Oregon into the Union February 14, 1859, and has always been part of that State.

V.

A vast area of public domain situated in what is now southeastern Oregon was owned by the United States at and immediately preceding the admission of Oregon into the Union, including the lands here involved. For present purposes, these lands are divided into five Divisions, employed for simplicity and on account of conditions in one or more not common to all. The five divisions are herein called:

1. Malheur Lake Division;
2. Narrows Division;
3. Mud Lake Division;
4. Sand Reef Division, and
5. Harney Lake Division.

The areas constituting the five Divisions just mentioned are bordered by the following fractional townships, all east of the Willamette Meridian, Oregon, to wit: Township 25 South, Ranges 32, 32½, all North of Malheur Lake; Township 25 south, Range 33; Township 26 South, Range 29, Township 26 South, Ranges 30, 31 and 32, North and South of Malheur Lake; Township 26 South, Range 33; Township 27 South, Ranges 29, 29½, 30, 32; Township 28 South, Range 29¾.

The lands within these Divisions are unsurveyed.

All of the lands within the five Divisions below the line of ordinary or mean high water are "lake bed land" (Bill of Complaint, par. I) and/or "the bed of lakes" (Amended Answer, par. I). The terms "lake bed land" and "the bed of lakes" in these findings are used inter-

changeably to indicate land underlying water up to the line of ordinary or mean high-water.

These findings are accompanied by a bound volume entitled "Special Master's Report: Volume 2," made up of Appendices consisting of tables, plates (maps and diagrams) and lists, containing material supporting these findings or giving details in respect of subjects dealt with herein. The Appendices are given numbers and described hereinafter.

Appendix 1

is a general description of the Divisions (with closing lines employed to separate them one from another) but without courses and distances.

Appendix 2

is a description, by courses and distances, of each of the five Divisions respectively, with closing lines above mentioned, and of the five Divisions collectively, disregarding the closing lines. The description is made up from surveys under the direction of the United States, the meander lines of which joined together constitute an encircling and continuous line of all of the Divisions collectively, disregarding the closing lines, which encircling and continuous line will be hereinafter spoken of as the Meander Line Boundary.

The distances along the Meander Line Boundary bordering each of the Divisions (and all of them collectively), without closing lines, as well as the acreage areas within the Divisions, are as follows:

The Distances Along the Meander Line Boundary and the Acreage Areas Within Each of the Five Divisions.

Division	Chains	Miles	Acres
1. Malheur Lake	4,723.56	59.044	47,670.40
2. Narrows	376.45	4.706	295.60
3. Mud Lake	806.94	10.087	1,466.00
4. Sand Reef	600.96	7.512	2,792.00
5. Harney Lake	1,920.84	24.011	29,562.00
Totals	8,428.75	105.360	81,786.00

Prior to February 14, 1859, no portion of any of the five Divisions or the waters or shores thereof was reserved, disposed of or granted away, or attempted to be reserved, disposed of or granted away by the United States by statute, treaty, patent or otherwise; and no portion of any of the five Divisions has been disposed of by the United States since February 14, 1859, in terms, nor at all, unless as a legal result of the patenting or other disposition of the uplands by the United States.

VI.

By Executive Order of August 18, 1908, The President set apart and reserved by public proclamation for the use of the Department of Agriculture all of the lands therein designated, including the lake-bed lands in the Bill of Complaint described, except a tract of 115.92 acres in fractional T. 28 S., R. 29¾ E., hereinafter referred to, as a permanent preserve and breeding ground for native birds, to be known as the Lake Malheur Reservation. A copy of said proclamation with diagram attached, showing the lands embraced in said Reservation, is Exhibit B to the Bill of Complaint. Said proclamation reads as follows:

"Executive Order.

"It is hereby ordered that all smallest legal subdivisions which touch the shore line of Lakes Malheur and Harney and the streams and waters connecting these lakes in township twenty-five south, ranges thirty-two, thirty-two and one-half and thirty-three; township twenty-six south, ranges twenty-nine, thirty, thirty-one, thirty-two and thirty-three; township twenty-seven south, ranges twenty-nine, twenty-nine and one-half, thirty and thirty-two, all east of the Willamette Meridian, Oregon, together with all islands and unsurveyed lands situated within the meander lines of said lakes and connecting waters, as segregated by the broken line shown upon the diagram hereto attached and made a part of this Order, are hereby reserved, **subject to valid existing rights**, and set aside for the use of the Department of Agriculture as a preserve and breeding ground for native birds. The taking or destruction of birds' eggs and nests, and the taking or killing of any species of native bird for any purpose whatsoever, except under such rules and regulations as may be prescribed by the Secretary of Agriculture, is prohibited, and warning is expressly given to all persons not to commit within the reserved territory any of the acts hereby enjoined. This reserve to be known as Lake Malheur Reservation.

THEODORE ROOSEVELT.

The White House,
August 18, 1908."

Prior to the Executive Order of August 18, 1908, the United States had undertaken the conservation of migratory and native birds on property of the United States or upon any reserve established under any law or Executive Order, and authorized the Secretary of Agriculture to permit or prohibit the use of such lands under rules and regulations to be prescribed by him.

Following the Executive Order dated August 18, 1908, the United States, through the Department of Agriculture, Biological Survey, took active control of all surveyed and undisposed of lands owned by the United States lying between the boundaries of Lake Malheur Reservation and the Meander Line Boundary, and also of all the lands within the above five Divisions (without disturbing the occupancy of "settlers" hereinafter mentioned), excluded hunters therefrom; and prohibited hunting thereon, erected posts marking the outside limits of the reservation, posted notices advising persons of the existence of the reservation, and warning hunters to refrain from shooting thereon; and engaged in the development and administration of said Lake Malheur Reservation in line with the purposes for which it was created, and has continued so to do to the present time.

The boundaries of Lake Malheur Reservation have never been changed; and none of the lands therein has been a part of the public domain of the United States, subject to disposal under existing Acts of Congress since August 18, 1908.

It is not true that the Executive Order of August 18, 1908, was of no force or effect, or that it was ultra vires, or that it constituted an unlawful or any attempt to exercise jurisdiction or control over lands or waters owned by or under the control of the State of Oregon. (*United States v. Midwest Oil Co.*, 236 U. S. 459, 466, 470 [1915].)

VII.

The exterior limits of said Lake Malheur Reservation are hereinafter referred to as the Executive Order Boundary.

The areas within the Meander Line Boundary are embraced by and within the Executive Order Boundary except an area within Harney Lake of 115.92 acres within the shore line of Harney Lake on its most southerly side

where it crosses the Executive Order Boundary into the area marked on the Executive Order diagram "Unsurveyed", and then returns, again crossing the Executive Order Boundary, thus making a small bay.

The area of lake bed land thus enclosed is the 115.92 acres (a part of 29,562 acres shown on the table in finding V) and lies within T. 28 S., R. 29¾ E. as shown by a survey approved June 23, 1911.

The frontage of the uplands bordering on the 115.92 acres amounts to 97.90 chains which is a part of the 1920.84 chains shown on the table in finding V. The "smallest legal subdivisions which touch the shore line" of the 115.92 acres amount to 145.25 acres, are owned by the United States and constitute part of the 2566.17 acres shown on the third table in finding VIII.

The Executive Order Boundary includes lands which are not within the Meander Line Boundary, i. e.,

> "all smallest legal subdivisions which touch the shore line of Lakes Malheur and Harney and the streams and waters connecting these lakes."

VIII.

The lands within the Executive Order Boundary but outside the Meander Line Boundary are surveyed and embrace 9725.96 acres, all bordering on the Meander Line Boundary. They comprise "all smallest legal subdivisions which touch the shore line of Lakes Malheur and Harney and the streams and waters connecting these lakes".

Of said 9725.96 acres the United States had prior to the Executive Order, patented 3616.55 acres thereof to individuals, and 742.31 acres had passed or been listed to the State of Oregon, 285.11 acres as school, 457.20 acres as indemnity lands, leaving the remaining 5367.10 acres undisposed of. The school and indemnity lands passed or were listed to Oregon under the Act of February 14, 1859

admitting Oregon into the Union (11 Stats. 383, Chap. 33). See *United States v. Morrison*, 240 U. S. 192 (1916).

Subsequent to August 18, 1908, and before the filing of the Bill of Complaint herein on December 1, 1930, the United States had patented 1057.04 acres to private individuals and there had passed or been listed to the State of Oregon 223.63 acres as school and 24.90 acres as indemnity lands, leaving 4061.53 acres undisposed of. The patents thus issued covering said 1057.04 acres and the listing of said 24.90 acres were based upon rights initiated and which had accrued under the laws of the United States prior to the date of the Executive Order. The survey or surveys covering the above mentioned 223.63 acres were not approved as to 140.60 acres thereof until June 23, 1911, nor as to the remaining 83.03 acres until July 29, 1913, both long subsequent to the date of the Executive Order of August 18, 1908, and hence it is claimed that title to the 223.63 acres never passed to Oregon (see *United States v. Morrison*, 240 U. S. 192 [1916]).

The first patent for any land bordering on the Meander Line Boundary and within the Executive Order Boundary was issued August 5, 1898, and the last October 28, 1915. In most instances the patents were of compact tracts lying partly within the Executive Order Boundary and partly outside thereof but bordering thereon.

The three tables which follow give the acreage of lands (a) patented to individuals, (b) passed or listed to Oregon, and (c) undisposed of (1) up to the date of the Executive Order August 18, 1908; (2) between the date of the Executive Order and the commencement of this suit December 1, 1930; and (3) up to the latter date.

Up to August 18, 1908 (Executive Order).

	Individuals	Oregon	Undisposed of	Total
	Acres	Acres	Acres	Acres
1. Malheur Lake	2,904.73	275.37	1,763.07	4,943.17
2. Narrows	302.39	67.53	None	369.92
3. Mud Lake	409.43	226.78	201.44	837.65
4. Sand Reef	None	None	629.44	629.44
5. Harney Lake	None	172.63	2,773.15	2,945.78
Grand Totals	3,616.55	742.31	5,367.10	9,725.96

Between August 18, 1908 and December 1, 1930.

	Individuals	Oregon	Undisposed of	Total
	Acres	Acres	Acres	Acres
1. Malheur Lake	730.35	24.90	1,007.82	1,763.07
2. Narrows	None	None	None	None
3. Mud Lake	201.44	None	None	201.44
4. Sand Reef	79.14	62.76	487.54	629.44
5. Harney Lake	46.11	160.87	2,566.17	2,773.15
Grand Totals	1,057.04	248.53	4,061.53	5,367.10

Up to December 1, 1930 (Commencement of Suit).

	Individuals	Oregon	Undisposed of	Total
	Acres	Acres	Acres	Acres
1. Malheur Lake	3,635.08	300.27	1,007.82	4,943.17
2. Narrows	302.39	67.53	None	369.92
3. Mud Lake	610.87	226.78	None	837.65
4. Sand Reef	79.14	62.76	487.54	629.44
5. Harney Lake	46.11	333.50	2,566.17	2,945.78
Grand Totals	4,673.59	990.84	4,061.53	9,725.96

To December 1, 1930, the United States had patented 4673.59 acres to individuals, but before that date Oregon had acquired 225.47 acres of this patented land through foreclosure for moneys loaned to patentees by Oregon from its Common School Fund. Hence on December 1, 1930 the patented lands were held (a) 4448.12 acres by individuals; and (b) the above 225.47 acres by Oregon, making the total as stated, 4673.59 acres.

In addition Oregon had obtained 990.84 acres directly from the United States; thereby making her total 1216.31 acres.

Of this acreage, Oregon disposed of 594.58 acres and owned or claimed at the commencement of suit 621.73 acres consisting of (a) 396.26 acres obtained directly from the United States; and (b) the above 225.47 acres indirectly through patentees.

The following table shows the 1216.31 acres so obtained by Oregon, arranged according to the five Divisions upon which they border. The stars indicate the lands which were sold by Oregon prior to the commencement of the suit.

Acreage Acquired or Claimed by Oregon Obtained Directly From United States or Indirectly Through Patentees to Commencement of Suit.

	Directly	Indirectly	Total
1. Malheur Lake	300.27*	.....	300.27
2. Narrows	67.53*	131.08	198.61
3. Mud Lake	226.78*	94.39	321.17
4. Sand Reef	62.76	.....	62.76
5. Harney Lake	333.50	.....	333.50
	990.84	225.47	1216.31

*Sold by Oregon before commencement of suit.

Thus it is to be seen that Oregon sold only lands which had been acquired directly from the United States and none of the lands acquired indirectly through patentees.

A table is given below which shows whether Oregon obtained the directly acquired lands (a) as school lands; or (b) as indemnity lands.

The acreage below indicated by a star was sold by Oregon prior to the commencement of the suit. The remainder of the acreage (not marked with a star) comprises the school and indemnity lands which Oregon held at the commencement of the suit.

School and Indemnity Lands Acquired or Claimed by Oregon to Commencement of Suit.

	School	Indemnity	Total
1. Malheur Lake	112.48*	187.79*	300.27
2. Narrows	.....	67.53*	67.53
3. Mud Lake	.....	226.78*	226.78
4. Sand Reef	62.76	.....	62.76
5. Harney Lake	333.50	.....	333.50
	508.74	482.10	990.84

*Sold by Oregon before commencement of suit.

Thus it appears that the only uplands owned or claimed by Oregon at the commencement of this suit were (a) 131.08 acres bordering on the Narrows Division acquired from patentees; (b) 94.39 acres bordering on the Mud Lake Division acquired from patentees; (c) 62.76 acres bordering on the Sand Reef Division acquired as school lands; and (d) 333.50 acres bordering on the Harney Lake Division acquired as school lands—totaling 621.73 acres.

This is brought out in the following table:

1216.31 Acres Acquired and 594.58 Acres Sold by Oregon Before Commencement of Suit Comprising (a) School Lands; (b) Indemnity Lands and (c) Patented Lands Acquired from Patentees Through Foreclosure.

	School	Indemnity	Patentees	Total
1. Malheur Lake	112.48*	187.79*	.....	300.27
2. Narrows	.....	67.53*	131.08	198.61
3. Mud Lake	.....	226.78*	94.39	321.17
4. Sand Reef	62.76†	.....	.....	62.76
5. Harney Lake	333.50‡	.....	.....	333.50
	508.74	482.10	225.47	1216.31

*Sold by Oregon before commencement of suit.
†Survey approved after Executive Order August 18, 1908.
‡172.63 acres through survey approved prior and 160.87 acres through surveys approved subsequent to August 18, 1908.

In addition, Oregon used as base certain lands within the Meander Line Boundary constituting deficiencies in three Sections 36. The amount of base thus taken (which was taken for and used elsewhere) was 158.92 acres in Section 36:25:32 (North of Malheur Lake) in Malheur Lake Division; 96.66 acres (104.18 acres available, less 7.52 acres not utilized) in Section 36:26:33 in Malheur Lake Division, and 67.37 acres in Section 36:26:29, Harney Lake Division.

All of the indemnity land within the Executive Order Boundary listed to the State of Oregon was in lieu of deficiencies consequent upon the creation of the Cascade Range Forest Reserve (see Exhibit A to Bill of Complaint).

Oregon obtained title to all school lands within the Executive Order Boundary which at the date of the approvals of the surveys in respect thereof were available to her.

No swamp or overflowed lands are involved in this suit.

Oregon's title to the lands acquired from the patentees and 172.63 acres of school lands bordering on the Harney Lake Division is undisputed. Oregon's title to 62.76 acres bordering on the Sand Reef Division and 160.87 acres bordering on the Harney Lake Division is disputed upon the ground that the surveys covering this acreage were not approved until after the Executive Order of August 18, 1908, and if that order is valid this acreage totaling 223.63 acres was not subject to disposal at the time the surveys were approved and hence Oregon acquired no title thereto (*United States v. Morrison*, 240 U. S. 182; *Alberger v. Kingsbury*, 6 Cal. App. 93, 91 P. 674 [1907]).

The table below shows all school lands bordering on the five Divisions ever granted, or claimed by Oregon to have been granted to her by the United States under the act of admission into the Union.

School Lands Granted or Claimed by Oregon to Have Been Granted to Her by the United States Under the Act of Admission Prior to Commencement of Suit Arranged According to Divisions Upon Which They Border.

Malheur Lake Division.

T. 26 S., R. 33 E.
(Survey approved September 28, 1897.)

		Acreage	
Section 16,	Lot 1,	26.50	
	Lot 3,	41.18	
	Lot 4,	44.80	112.48

Sand Reef Division.

T. 26 S., R. 30 E. (N. of Malheur Lake).
(Survey approved July 29, 1913.)

Section 36,	Lot 1,	21.25	
	Lot 2,	20.92	
	Lot 3,	20.59	62.76

Harney Lake Division.

T. 26 S., R. 30 E. (N. of Malheur Lake).		
(Survey approved July 29, 1913.)		
Section 36, Lot 4,	20.27	20.27
T. 26 S., R. 29 E.		
(Survey approved April 15, 1880.)		
Section 36, Lot 1,	32.00	
Lot 2,	21.50	
Lot 3,	39.13	
SW SW	40.00	
SE NE	40.00	172.63
T. 27 S., R. 29½ E.		
(Survey approved June 23, 1911.)		
Section 36, Lot 1,	42.30	
Lot 2,	24.90	
Lot 3,	52.70	
Lot 4,	20.70	140.60
Total		508.74
Oregon disposed of the above 112.48 acres in the Malheur Lake Division prior to the commencement of suit		112.48
School lands owned or claimed by Oregon at commencement of suit		396.26

IX.

The table below gives the acreage and frontage along the Meander Line Boundary of all lands bwned or claimed by Oregon at the commencement of the suit which she obtained directly from the United States. (These are exclusively school lands, as Oregon disposed of all indemnity lands before the commencement of suit.)

The Only Lands Within the Executive Order Boundary Which Passed or Were Listed to Oregon (or Which are Claimed by Oregon so to Have Been), Not Disposed of by Her at the Commencement of This Suit, With Frontage Thereof on Meander Line Boundary Stated in Chains.

Sand Reef Division:

North Boundary:
T. 26 S., R. 30 E.
(North of Malheur Lake)

		Acres	Chains	
Sec. 36	Lot 1	21.25	20.40	
	Lot 2	20.92	20.39	
	Lot 3	20.59	20.39	
		62.76	61.18	
Total for Sand Reef Division			62.76	61.18

Harney Lake Division:

North Boundary:
T. 26 S., R. 29 E.

		Acres	Chains	
Sec. 36	Lot 3	39.13	21.00	
	Lot 2	21.50	23.98	
	Lot 1	32.00	34.02	
	SW¼ SW¼	40.00	7.00	
	SE¼ NE¼	40.00	12.35	
		172.63	98.35	
T. 26 S., R. 30 E. (of Malheur Lake)			172.63	98.35
Sec. 36	Lot 4	20.27	20.39	
			20.27	20.39

South Boundary:				
T. 27 S., R. 29½ E.				
Sec. 36	Lot 1	42.30	22.30	
	Lot 2	24.90	23.72	
	Lot 3	52.70	24.62	
	Lot 4	20.70	21.66	
	Total	140.60	92.30	
			140.60	92.30
Total for Harney Lake Division			333.50	211.04

Recapitulation.

Total acreage and frontage on the Meander Line Boundary of lands claimed by Oregon to have been acquired directly from the United States and which were not disposed of by her at the commencement of this suit	396.26	272.22

X.

The 225.47 acres of patented land already mentioned were acquired by Oregon through foreclosure between October 10 and November 10, 1928.

The table below gives the acreage and frontage in chains along the Meander Line Boundary of all lands thus acquired, none of which had been sold by her prior to the commencement of the suit.

Acreage and Frontage in Chains Along the Meander Line Boundary of all Lands Acquired by Oregon From the Patentees Through Foreclosure.

Narrows Division:

T. 26 S., R. 31 E.,
North of Malheur Lake.

		Acres		Frontage Chains	
Sec. 26	SW SW	40.00		4.00	
Sec. 27	Lot 1	33.40		27.08	
Sec. 35	Lot 1	4.98		21.42	
	Lot 2	9.80		18.02	
Total North Boundary		88.18		70.52	
			88.18		70.52

T. 26 S., R. 30 E.,
South of Malheur Lake.

Sec. 26	Lot 7	19.94		28.17	
	Lot 8	12.12		20.28	
Sec. 27	Lot 1	3.65		20.39	
	Lot 2	7.19		20.31	
Total South Boundary		42.90		89.15	
			42.90		89.15
Total for Narrows Division			131.08		159.67

Mud Lake Division:

T. 26 S., R. 30 E., South of Malheur Lake.					
Sec. 27	Lot 2			8.00	
Sec. 34	Lot 1	37.35		10.28	
	Lot 2	18.38		32.65	
	Lot 3	38.66		21.38	
Total for Mud Lake Division		94.39		72.31	
			94.39		72.31
Lands acquired from patentees by Oregon with the frontages thereof on the Meander Line Boundary			225.47		231.98

XI.

At the time of the commencement of this suit the lands bordering on the Meander Line Boundary had the frontages and were held as below.

Division	United States Chains	State of Oregon Chains	Individuals Chains	Total Chains
1. Malheur Lake	954.11	None	3,769.45	4,723.56
2. Narrows	None	159.67	216.78	376.45
3. Mud Lake	None	72.31	734.63	806.94
4. Sand Reef	510.35	61.18	29.43	600.96
5. Harney Lake	1,688.59	211.04	21.21	1,920.84
Totals	3,153.05	504.20	4,771.50	8,428.75
	37.41%	5.98%	56.61%	100%

Thus at the commencement of this suit the United States had disposed of, and had on hand undisposed of, the

frontages, arranged in percentages according to Divisions, as follows:

Percentage of Upland in Each of the Five Divisions Disposed of and Undisposed of by the United States at the Commencement of the Suit.

	Disposed of	Undisposed of
	%	%
1. Malheur Lake	79.80	20.20
2. Narrows	100.00	.....
3. Mud Lake	100.00	.....
4. Sand Reef	15.08	84.92
5. Harney Lake	12.09	87.91
6. Five Divisions collectively	62.59	37.41

Description by Governmental Subdivision of (a) School and (b) Indemnity Lands Sold by Oregon, Arranged According to Divisions, with Frontages of Each Parcel on the Meander Line Boundary Stated in Chains.

School Lands.

Malheur Division.

T. 26 S., R. 33 E.
(South of Malheur Lake)

	Acres	Chains
Sec. 16, Lot 1	26.50	20.76
Lot 3	41.18	21.27
Lot 4	44.80	20.21
Total for Township and Division	112.48	62.24

Indemnity Lands.

Malheur Division.

T. 25 S., R. 32½ E. (North of Malheur Lake)				
Sec. 28, Lot 1	11.97		32.50	
Total for Township		11.97		32.50
T. 26 S., R. 32 E. (South of Malheur Lake)				
Sec. 27, Lot 6	24.90		20.81	
Sec. 32, Lot 4	30.30		31.91	
Total for Township		55.20		52.72
T. 26 S., R. 31 E. (South of Malheur Lake)				
Sec. 28, Lot 1	19.40		19.98	
Sec. 30, Lot 13	12.17		19.98	
Lot 14	16.80		19.63	
Lot 15	14.70		20.52	
Lot 16	25.07		21.75	
Total for Township		88.14		101.86
T. 26 S., R. 30 E. (South of Malheur Lake)				
Sec. 25, Lot 9	15.18		20.01	
Lot 10	17.30		20.01	
Total for Township		32.48		40.02
Total for Division		187.79		227.10

Narrows Division.

T. 26 S., R. 31 E.
(North of Malheur Lake)

	Division A.			
Sec. 26, Lot 3	29.17		24.37	
Lot 4	19.17		30.77	
Total		48.34		55.14
	Division B.			
Sec. 27, Lot 2	19.19		29.25	
		19.19		29.25
Total for Township and Division		67.53		84.39

Mud Lake.

T. 26 S., R. 30 E.
(South of Malheur Lake)

Sec. 32, Lot 1	7.10		19.40	
Lot 2	42.67		45.16	
Lot 7	7.77		25.96	
Sec. 33, Lot 1	24.53		32.59	
Sec. 28, Lot 1	1.53		11.75	
Total for Township		83.60		134.86

T. 26 S., R. 31 E.
(North of Malheur Lake)

Sec. 32, Lot 1	24.30		29.66	
NE¼ NE¼	40.00		12.00	
Sec. 33, Lot 1	20.46		41.13	
Sec. 27, Lot 4	21.48		21.56	
Lot 3	36.94		22.26	
Total for Township		143.18		126.61
Total for Division		226.78		261.47

Recapitulation.

School lands.				
Malheur Division			112.48	62.24
Indemnity lands.				
Malheur Division			187.79	227.10
Mud Lake			226.78	261.47
Narrows				
A.	48.34	55.14		
B.	19.19	29.25	67.53	84.39
Grand Total			482.10	572.96

XII.

The only surveys of the public domain in the vicinity here involved which antedated 1895 were made by direction of the Secretary of the Interior, pursuant to laws of the United States, in the years and by the surveyors following: 1875: J. W. Meldrum; 1877: J. W. Meldrum; 1877: Rufus S. Moore and Henry Meldrum; 1879: H. C. Perkins; 1888: J. H. Neal; and 1892: Henry C. Cooke.

In connection with these surveys, incomplete meander lines were run (as shown by Appendix 3), and at different elevations and without contours. Said surveys are not now and never have been the boundary of Malheur Lake. (See Bill of Complaint, par. IV.)

XIII.

Pursuant to directions of the Secretary of the Interior December 3, 1894 (19 L. D. 439, 440 ft.) the Surveyor General of Oregon, advertised for bids for a new survey of the Lake Malheur region, as a result whereof the contract

was awarded to John H. Neal June 1, 1895. The instructions under which he acted in making the survey are set forth in Joint Abstract of Record, Vol. I, pp. 176 to 183. In these instructions he was required to establish the mean high-water mark or line which he accordingly did.

At the conclusion of his survey Neal prepared his field notes thereof and of the new meander line and filed the same in the office of the United States Surveyor General for Oregon who prepared plats therefrom and transmitted the plats and field notes to the General Land Office where they were filed. These were approved June 24, July 6, and September 28, 1897, by the Commissioner of the General Land Office. Duplicates of the approved plats and field notes were then sent to the Surveyor General of Oregon and duplicates of the plats to the Register and Receiver of the local land office in Oregon. The field notes and plats have ever since remained on file and of record in the General Land Office and in the office of the United States Surveyor General for Oregon and the plats in the office of the Register and Receiver of the local land office in Oregon. The plats have never been amended or altered, but have been acted upon by the United States as true and correct ever since their approval. The meander lines run by Neal were correctly run and properly laid down, made in good faith and without fraud or gross error or mistake, and have ever since their approval remained unimpeached and constitute a correct establishment of the meander lines surveyed by him.

In his survey Neal ran a continuous but unclosed meander line at different elevations and without contours (which in no way impairs the correctness of his survey), extending a distance of 81.098 miles on both sides of what are herein called (1) Malheur Lake Division; (2) Narrows Division; (3) Mud Lake Division; (4) substantially the whole of Sand Reef Division and (5) a negligible portion of Harney Lake Division. The line

along the north side of these divisions ran to the southwest corner of Lot 3, Section 31, Township 26 South, Range 31 East (North of Malheur Lake), which is in the Sand Reef Division, and the line along the south line ran to the southwest corner of Lot 4, Section 19, Township 27 South, Range 30 East (South of Malheur Lake), which is on the Harney Lake Division. The distance between the two points at which these lines ended is about four miles in a straight line. (See Appendix 3.) Said survey was incomplete only in the sense that it was not closed.

The Harney Lake Division had been partially meandered by H. C. Perkins in 1879 and Henry C. Cooke in 1892 (see Appendix 3), leaving portions on the north and south shores thereof which remained unsurveyed until a portion thereof was meandered by Rufus S. Moore in 1902 and another portion by Rodolf and Ganong in 1912, thereby completing the meandering of the five Divisions by the tying-in of the meander line of Neal with the said surveys of 1902 and 1912, themselves supplemented by the earlier surveys of Perkins in 1879 and Cooke in 1892 (see Appendix 3) and thus making Neal's line a closed meander survey. The surveys of Perkins, Cooke, Moore, Rodolf and Ganong had been approved by the Commissioner of the General Land Office before the commencement of this suit; some of them prior to the date of the Executive Order of August 18, 1908, and others later.

Appendices 3 to 8, inclusive, in "Special Master's Report: Volume 2," mentioned in Finding V, are as below.

Appendix 3.

A plate delineating (a) the area involved, (b) the five divisions thereof, (c) the location of earlier meander surveys and (d) their relation to the Meander Line Boundary.

Appendix 4.

A plate showing the Malheur Lake Division and indicating (a) the United States frontage, and (b) the frontage of private proprietors, Oregon having none in this Division.

Appendix 5.

A plate showing the Narrows Division, divided at the Bridge into areas A and B respectively, showing (a) the frontage of lands on the meander line of subdivision A (between the Bridge and the Malheur Lake Division) all owned by individuals, no part by either the United States or the State of Oregon; and (b) the frontage of lands on the meander line of subdivision B (between the Bridge and the Mud Lake Division) owned partly by the State of Oregon and partly by individuals, no part by the United States.

Appendix 6.

A plate showing the Mud Lake Division and indicating the frontages on the meander line owned by the State of Oregon and by individuals, no part thereof by the United States.

Appendix 7.

A plate showing the Sand Reef Division and indicating the frontage on the meander line (510.65 chains) of 487.54 acres owned by the United States; the frontage (29.43 chains) of 79.14 acres held by two individuals; and the frontage (61.18 chains) of three lots totaling 62.76 acres claimed by Oregon if the Executive Order be invalid; otherwise not.

The two parcels within the Sand Reef Division owned by individuals are Lot 5, Section 4, T. 27 S., R. 30 E. (South of Malheur Lake), containing 41.84 acres, patented to Aaron Farnsworth April 3, 1913,

upon a homestead entry initiated September 23, 1907; and Lot 5, Section 8, same township and range, containing 37.30 acres, patented to Armenious C. Lynch September 16, 1912, upon a homestead entry initiated December 20, 1906.

Appendix 8.

A plate showing the Harney Lake Division and indicating the frontage on the meander line (1688.59 chains) of 2566.17 acres owned by the United States; the frontage (21.21 chains) of 46.11 acres owned by one individual; and the frontage (211.04 chains) of 333.50 acres, of which Oregon owns 172.63 acres and of which Oregon claims 160.87 acres if the Executive Order be invalid; otherwise not. (Finding IX gives the details by which the above frontage of 211.04 chains and the above total of 333.50 acres are arrived at.) Oregon used a deficiency of 67.37 acres in Section 36:26:29, of which the above 172.63 acres constitute the smallest legal subdivisions touching the shore line. (See finding VIII.)

The one tract bordering on the meander line of the Harney Lake Division, which is owned by an individual, is Lot 5 in Section 2 of Township 27 South, Range 29 East containing 46.11 acres was patented by the United States June 13, 1910 to John C. Clement under a homestead entry made April 6, 1907.

XIV.

All of the patents issued to individuals by the United States describe by governmental subdivisions the lands patented thereby, adding "according to the official plat of the survey of the said lands returned to the General Land Office by the Surveyor General". This is not true in respect of indemnity lands listed to the State of Oregon nor school lands which passed to Oregon under the provisions of the Act admitting Oregon into the Union.

In none of the patents to individuals nor in the certificates listing indemnity lands to Oregon, was there any reservation or restriction (in terms) by the United States of title or interest to any of the lake bed lands or the shores thereof or the waters thereon. In respect of the school lands there was no instrument of transfer or writing evidencing transfer. The passage of title where it occurred rested upon the Act of Admission and the fact that a survey covering a 16th or 36th section had been approved.

The 482.10 acres of indemnity lands acquired by Oregon, as shown in finding VIII, were listed on ten different lists, all to the same purport and effect. A photostatic copy of one of them is included in "Special Master's Report: Volume 2", and is Appendix 19 hereinafter listed. Said ten lists were consolidated later into three lists for convenience of certification (see pp. 8, 32, supra).

All instruments of or evidencing transfer except where otherwise herein stated were in the form of one or another of the patents, or lists set forth in Defendant's Exhibit X-5. (See Joint Abstract of Record, Vol. I, pages 110-132.) These instruments of or evidencing transfers described lands which by reference to the approved plats would be shown to be, as in fact they were, lands bordering on a meander line.

All of said instruments described land bordering upon the Neal Meander Line of 1895-1896 except (a) one parcel patented to John C. Clement June 13, 1910, mentioned in finding XIII, and (b) the school lands on the Sand Reef Division and the Harney Lake Division totaling 396.26 acres, owned or claimed by Oregon as shown in finding IX.

The lands patented to John C. Clement and the parcels of school lands just mentioned border on the meander line surveys of Rufus S. Moore (1902) and H. C. Perkins

(1879), respectively (which surveys were partially approved on April 15, 1880, prior to the Executive Order of August 18, 1908, and the remainder on June 23, 1911), and on the meander line survey of Rodolf and Ganong (1912) which survey was not approved until July 29, 1913.

Appendices 9 to 12, inclusive, in "Special Master's Report: Volume 2," mentioned in Finding V, are as below.

Appendix 9.

A statement of the origin of the titles to the lands bordering on the Meander Line Boundary and within the Executive Order Boundary outstanding at the date of the commencement of this suit, arranged according to and amongst the five Divisions. This statement notes every patent issued to December 1, 1930; also all school lands which passed to and indemnity lands which were listed (or which it is claimed passed or were listed) to Oregon under the laws of the United States and all lands retained by the United States on December 1, 1930. Said statement gives the names of the patentees, descriptions of lands patented, acreage therein, type of entry, statute involved, date of settlement, date of application and number, entry, final certificate and number and date of patent or grant or of approval of survey.

Appendix 10.

A statement enumerating all lands bordering upon the Meander Line Boundary within the Executive Order Boundary and arranged according to Divisions patented to individuals and listed to, or which passed, or which it is claimed passed to the State of Oregon subsequent to August 18, 1908.

Appendix 11.

A list of all lands arranged according to Divisions bordering on the Meander Line Boundary owned by the United States December 1, 1930, the date of the commencement of this suit, showing description of land, acreage, and frontage in chains and feet.

Appendix 12.

A list of all lands arranged according to Divisions bordering on the Meander Line Boundary owned or claimed by the State of Oregon December 1, 1930, showing description of land, acreage and frontage in chains and feet.

XV.

The State of Oregon makes the claims stated below in respect of lands lying within the Meander Line Boundary and/or the Executive Order Boundary:

(a) Claims that the lake bed lands lying within the Meander Line Boundary passed to the State of Oregon upon its Admission to the Union February 14, 1859 as all of these lands underlay navigable waters on that day.

(b) Claims the Meander Line Boundary as the true and correct line of ordinary or mean high-water at the time of the John H. Neal survey of 1895-1896, and does not question the approval of the field notes of said survey and the official plat thereof; but claims that if the line of ordinary or mean high water shall be determined to have lain outside the Meander Line Boundary on February 14, 1859, then the State of Oregon takes the lake bed lands up to that line as lands which underlay navigable waters on February 14, 1859, subject to such loss, if any, as may have accrued by natural reliction up to May 24, 1921 (namely ninety days after February 23, 1921), when

Chapter 280, General Laws of Oregon 1921, page 521, approved February 25, 1921, took effect; also claiming that this statute took from the littoral proprietors all right to future reliction (see Amended Answer p. 33, for text of statute; also Supplement hereto, infra p. vii).

(c) Claims title to the following lands lying between the Executive Order Boundary and the Meander Line Boundary (1) 172.63 acres of school lands bordering on the Harney Lake Division shown in finding IX, passed to Oregon prior to the Executive Order of August 18, 1908; (2) 62.76 acres of school lands bordering on the Sand Reef Division shown in finding IX although the survey thereof was approved subsequent to the Executive Order of August 18, 1908, basing the claim upon the ground that the Executive Order was invalid; (3) 160.87 acres of school lands (i. e., two tracts of 20.27 and 140.60 acres respectively) bordering on the Harney Lake Division, although the survey thereof was approved subsequent to the Executive Order of August 18, 1908, basing the claim upon the ground that the Executive Order was invalid; (4) 131.08 acres bordering on the Narrows Division acquired by it from patentees as shown in finding X; (5) 94.39 acres bordering on Mud Lake Division acquired by it from patentees as shown in finding X, and (6) as stated in paragraph (b) of this Finding.

(d) Claims that the common law of Oregon is the same as the common law of Illinois as accepted in *Hardin v. Shedd,* 190 U. S. 508 (1903) in respect of patents and grants by an upland proprietor of land bordering upon the meander line of a lake, i. e., the grantee takes only to the line of ordinary or mean high-water and does not take to the center of the lake even if the grantor owns the bed.

(e) Claims as a deduction from the rule stated in paragraph (d), that immediately upon a grant or patent of upland (the grantor owning the bed), the State of Oregon acquires title from the meander line to the center of the lake which the grantee would have taken under the common law as declared in *Hardin v. Jordan*, 140 U. S. 371 (1891).

(f) Claims all titles and interests provided for in her statutes (1917-1931) set out in the Amended Answer and Counterclaim (also in Supplement, infra, pp. vi-xiv) including rights stated in (d) and (e) above, whether the statutes merely codify or modify its common law.

(g) Claims that the rules stated in (d), (e) and (f) are applicable to the patents of the United States made as herein found because such patents were made "according to the official plat of the survey of the said lands returned to the General Land Office by the Surveyor General"; and were made without reservations or restrictions in terms and were for fractional legal subdivisions, all of which were shown on the approved plats and by the approved field notes to border on a meander line; claims the same effect for statutory grants of school lands and the listings of indemnity lands pursuant to the act of admission as apply to patents.

(h) Claims that if Malheur Lake was not navigable February 14, 1859, nevertheless Oregon has the right of apportionment or partition of the lake bed lands within the Malheur Lake Division between the United States and itself as a sovereign under the claims set forth in paragraphs (d), (e), (f) and (g) above; and that in the apportionment or partition there should be allotted to Oregon such portions of the lake bed lands as the patentees collectively would have been

entitled to under the common law as declared in *Hardin v. Jordan*, 140 U. S. 371 (1891) and *Mitchell v. Smale*, 140 U. S. 406 (1891).

(i) Claims that the United States prior to August 18, 1908, had granted (by the act of admission) listed and/or patented a preponderant portion of all of the uplands along the meander line within the Malheur Lake Division (just under 80%); and in connection therewith invokes the claim that where the United States thus grants, lists and/or patents a preponderant portion or a material part of the uplands upon a correctly established meander line, without reservations or restrictions in terms in the grants, lists or patents, that it is within the competency and power of the State to declare the waters public or navigable waters and to assert ownership of and sovereignty over the waters and lands thereunder up to ordinary high water mark or line to the same extent that it might do in respect of beds and lands under navigable waters, and in the alternative claims all portions of the Malheur Lake Division to which Oregon is or may be entitled under approved methods of apportionment and claims that Oregon's portion should abut said listed and patented lands.

(j) Claims that if the Narrows Division be treated as a non-navigable stream (and not a lake) then (1) the bed thereof from the Bridge to the Malheur Lake Division up to the ordinary or mean high-water mark or line on both sides is owned by the individuals who collectively own the entire upland on both the north and south meander lines between the Bridge and the Malheur Lake Division; and (2) in respect of the portion of the Narrows Division between the Bridge and Mud Lake Division, that the same is wholly owned by the State of Oregon (as successor in interest of

patentees) and by individuals (themselves patentees or successors in interest) who collectively (with Oregon) own the entire upland on both the north and south meander lines between the Bridge and the Mud Lake Division.

(k) Makes the same claims respecting Mud Lake Division which are made in subdivisions (d), (e), (f) and (g) respecting the Malheur Lake Division and the alternative claims (1) that the lake bed lands within the Mud Lake Division are owned wholly by the State of Oregon because the United States patented and/or listed the entire uplands along the north and south meander lines of Mud Lake Division by patents and listings without reservation or restriction, granting fractional legal subdivisions, "according to the official plat of the survey of the said lands returned to the General Land Office by the Surveyor General", all of which were shown thereon to border on the meander line; and hence under the acts of the legislature of the State of Oregon set out in haec verba in its Amended Answer said Mud Lake Division constitutes a body of navigable water with all incidents thereto which exist under the common law or the statutory law of Oregon, and (2) that a right of apportionment exists between it, the State of Oregon, and the other owners of the upland in analogy to the claim set out in subdivision (h) above.

(l) As owner of 62.76 acres of school lands bordering on the Sand Reef Division mentioned in subdivision (c) of this finding, supra, makes the same claims in respect of the Sand Reef Division as are made in subdivisions (d), (e), (f), (g) and (h) of this finding in respect to the Malheur Lake Division.

Oregon concedes that all of the lands bordering on Sand Reef Division are owned by the United States

except the above 62.76 acres and two parcels owned by individuals—all subject however to the claim of Oregon that the Sand Reef Division constituted an integral part of navigable waters on February 14, 1859.

The two parcels bordering on the Sand Reef Division owned by individuals are Lot 5, Section 4, T. 27 S., R. 30 E. (south of Malheur Lake), containing 41.84 acres, patented to Aaron Farnsworth April 3, 1913, upon a homestead entry initiated September 23, 1907; and Lot 5, Section 8, same township and range, containing 37.30 acres, patented to Armenious C. Lynch September 16, 1912, upon a homestead entry initiated December 20, 1906.

(m) Claims in respect of the Harney Lake Division the same rights which it asserts in paragraphs (d), (e), (f) and (g) in respect of the Malheur Lake Division, and also a right of apportionment additional to that mentioned in subdivision (h) founded upon the circumstances (1) that it owns three fractional sections of school land bordering on the meander line of the Harney Lake Division, described in finding IX hereof; (2) that there is one other parcel of land on the meander line of Harney Lake in private ownership; and (3) the remainder is land owned by the United States.

The one tract bordering on the meander line of the Harney Lake Division, in private ownership, is Lot 5 in Section 2 of Township 27 South, Range 29 East, containing 46.11 acres, was patented by the United States June 13, 1910 to John C. Clement under a homestead entry made April 6, 1907.

XVI.

The State of Oregon, without prejudice to claims which it may hereafter and/or elsewhere make disclaims herein

(a) Title to any unsurveyed sixteenth or thirty-sixth school section within the Meander Line Boundary, whether fractional or otherwise.

(b) Title to Lots 1, 2 and 3, Section 36, T. 26 S., R. 30 E. (north of Malheur Lake), comprising 62.76 acres bordering on the meander line of the Sand Reef Division, as school lands or otherwise, if it be held that the Executive Order of August 18, 1908, had any efficacy to reserve such lands from disposal under the laws of the United States prior to the Migratory Bird Treaty with Canada of December 8, 1916 (39 Stat. 1702).

These lots were first surveyed in November, 1912 by Rodolf and Ganong but the survey was not approved until July 29, 1913. Therefore, these lots did not pass to the State under the Act of February 14, 1859 admitting Oregon into the Union (*United States v. Morrison*, 240 U. S. 192 [1916]) the Executive Order of August 18, 1908 being valid. (Upon this point see *United States v. Midwest Oil Co.*, 236 U. S. 459, 466, 470 [1915].)

(c) Title to Lot 4, Section 36, T. 26 S., R. 30 E. (North of Malheur Lake), comprising 20.27 acres bordering on the meander line of the Harney Lake Division, as school lands or otherwise, if it be held that the Executive Order of August 18, 1908, is valid.

The circumstances respecting the survey of this lot are precisely the same as those in respect of the lots dealt with in subdivision (b) of this finding, and are subject to the same observations as therein appear.

(d) Title to Lots 1, 2, 3 and 4 of Section 36, T. 27 S., R. 29½ E. bordering on the meander line of the Harney Lake Division, comprising 140.60 acres,

as school lands or otherwise, if it be held that the Executive Order of August 18, 1908, is valid.

These lots were first surveyed in 1902 by Rufus S. Moore, but the survey was not approved until June 23, 1911. The same considerations apply here as apply in respect of subdivisions (b) and (c) of this finding.

(e) Title to any portion of the stable islands and permanent lands within the Meander Line Boundary of the Malheur Lake Division which were on February 14, 1859, above the line of ordinary or mean high-water and without regard to whether the Malheur Lake Division constituted or did not constitute navigable waters on that day. Among the islands referred to above are Cole Island, Pelican Island, Graves Ridge and other unnamed but permanent bodies of land above the line.

XVII.

The State of Oregon makes only the claims of title and interest which are elsewhere in these findings set forth; all of these are adverse to the United States. The State of Oregon has no estate, title or interest in or to any of the lands within the Meander Line Boundary or the Executive Order Boundary except such as are herein and in the conclusions of law and the recommended form of decree expressly determined to be owned by her.

XVIII.

Harney County, Oregon, embraces over 10,000 square miles. Harney Valley, within which the lake-bed lands hereinbefore described are situated, embraces approximately 700 square miles of plain and lake-surfaced land and contains a very large expanse of practically level land.

Camp Harney was an army post within the Harney Valley existing in 1867. By 1879 the valley came to be inhabited by about ten or twelve families and 50 or 60 vaqueros (buckaroos), herding and feeding livestock in the Valley.

The Malheur Indian Reservation in the valley lay to the north of Malheur Lake and extended southerly. It was created by President Grant by Executive Order dated March 14, 1871, without any specific description, later supplied by another Executive Order which referred to Malheur Lake. By Executive Order of May 21, 1883, the Reservation was restored to the public domain. (Kappler, Laws and Treaties, 1904, Vol. I, pp. 887 to 890. See also: In re Rights to Waters of Silvies River, 115 Ore. 27, 35, 237 P. 322, 325, C. 1, Middle (1925).

The history of the Harney-Malheur Lakes region from 1825 to 1872 is given in the report and testimony of Dr. R. C. Clark of the University of Oregon, which will be found in the Joint Abstract of Record, page 1014, and following.

The first town in Harney Valley (the town of Egan) was established in 1881, and its population never exceeded about 50 persons. Egan was located about 2½ miles southwest of Burns, Oregon, which was established in 1882 or 1883. Burns is now incorporated and the county seat of Harney County.

Irregular in outline, the diameter of Harney Valley in any direction is approximately 50 to 60 miles and is traversed by roads connecting localities, and can be crossed by wagon in substantially all directions. The roads are connected with improved roads and railroads having interstate connections. The surface of the valley floor is alluvial material brought in by mountain streams, and deposited in broad low-grade alluvium fans. The

winds have deposited material in the form of sand and dust over the valley.

The lake-bed lands within the Meander Line Boundary lie within an arid, substantially barren and desolate country; and the vegetation within miles has always consisted principally of large areas of greasewood and sagebrush, and in earlier times of an abundant growth of native grasses affording range grazing for stock, more abundant, however, in the valleys of the Blitzen and Silvies Rivers and Silver Creek than elsewhere.

The normal annual precipitation of Harney Valley is between 8.6 inches and 10 inches and the annual evaporation within the Meander Line Boundary is approximately 40 inches.

The natural resources of this region have always made it a grazing country. The population is small and scattered. According to the 1930 census the population of Harney County was 5920 persons of whom 2599 resided in the town of Burns. The principal settlements in Harney Valley are Burns, Crane, Harney, Lawen and Narrows, and ever since their establishment they have been, and now are, connected with each other by good roads. Harney, Lawen and Narrows consist of less than ten families each and Crane of about fifty families.

Appendix 13

is a plate showing the location of the towns and roads within the region surrounding the Meander Line Boundary. (See "Special Master's Report: Volume 2.")

XIX.

During the period between 1870 and 1883 ranchmen and stockmen began wintering cattle in the Malheur Lake Division by driving them in the late fall or winter onto the Division to graze and feed. The cattle usually re-

mained until the spring break-up when they were removed to the ranges for late spring and summer grazing. (This course of husbandry is locally called "swamping".)

In 1887 or 1888, one or two "settlers" (locally so-called), took possession of lands within the Division, and between that time and 1895 about twenty additional "settlers" did likewise, taking possession of knolls and/or other areas within the Division which were of slightly higher elevation than other portions therein.

The settlers maintained identifiable holdings of land (in some instances by fencing), built and furnished habitations and provided improvements and equipment used in the raising of cattle; and lived within the Division each year (in some instances with their families) from summer months or late fall until the following spring. In the spring, as stated, the cattle were removed to the ranges for spring and summer grazing, and native grasses grew and matured within the Division which these settlers upon their return in the summer or fall put up as hay for winter feed for the cattle. Others who lived outside the Division followed the same course of husbandry within the Division.

The settlers from a very early time dealt with their holdings and the improvements thereon as property, disposed of the same by deeds, conveyances, bills of sale and other modes of transfer, and they were treated as passing by will or intestacy.

Subsequent to the issuance of the patents to lands bordering on the Meander Line Boundary, as already stated, some of the upland proprietors engaged in "swamping", in instances having habitations within the Division and in others not.

This occupancy and use of the Division grew in the periods between 1895 and the date of the Executive Order, August 18, 1908, and the latter date and the com-

mencement of this suit. December 1, 1930, when seventy-two tracts, varying in acreage from 4 acres to 5,504 acres, respectively (see Plaintiff's Exhibits 3 and 3a and 22), totalling about 29,406 acres out of 47,670.40 acres were enclosed by fences.

The aforesaid tracts, as shown by Appendix 14 below, are numbered 1 to 73 inclusive, excepting tract 60. Tract numbered 60 comprises about 18,264 acres, not enclosed nor occupied, but constituting an open range, which with the 29,406 acres mentioned in the last paragraph, make up the total area of the Malheur Lake Division, namely 47,670.40 acres.

Appendix 14

is a table, the correctness of which is agreed upon by the United States and the State of Oregon and found to be correct, which shows the acreage and claimants ("settlers") of tracts numbered 1 to 73, inclusive, within the Meander Line Boundary of the Malheur Lake Division using planimeter measurements. The areas themselves are delineated on Plaintiff's Exhibits 3, 3a, and 22.

XX.

Appendix 15

is a plate showing the important physical features of the drainage basin of Malheur and Harney Lakes. (See Special Master's Report, Vol. 2, page 82 and insert facing page 24 of Report, infra.) Said drainage basin is approximately 5340 square miles.

The principal source of inflow of Malheur Lake always has been, and is now from the Silvies River on the north and the Donner und Blitzen River (generally called the Blitzen River) on the south, which are mountain streams. The source of inflow of Harney Lake always has been, and is now, either from Malheur Lake through The Nar-

rows, and Mud Lake and the Sand Reef or from Silver Creek, a mountain stream, flowing thereto from the north. Said Silver Creek does not flow twelve months in the year.

The width of the Silvies River varies from 50 feet to 150 feet for a distance of approximately two miles from its mouth but no evidence was offered to show its width between the point where it enters Harney Valley and a point two miles from its mouth. (Amended Answer, Second Defense, Par. IV, page 23, lines 10-12.) A general description of the course and principal characteristics appear in *In re Rights to the Waters of Silvies River,* 115 Or. 27, 34-35, 237 Pac. 322, 324-325 (1925).

See also *Pacific Live Stock Co. v. Hanley* (9 C. C. A. 1912), 200 F. 468; *Pacific Live Stock Co. v. Silvies River Irr. Co.* (9 C. C. A. 1912), 200 F. 487; and *Hanley v. Pacific Live Stock Co.* (9 C. C. A. 1916), 234 F. 522.

The only evidence as to the stream discharge of Silver Creek is to be found in the report of L. T. Jessup, Hydraulic Engineer, Department of Agriculture (Plaintiff's Exhibit 52A, page 163, Table 24), covering a portion of each of the following years: 1917 and 1919-1923. The minimum discharge in any one of those years was 5330 acre-feet covering a three months period in 1920, and the maximum discharge was 33,900 acre-feet for a four months period in 1921. (See Appendix 17, page 88, Special Master's Report, Vol. 2.)

The only evidence respecting the discharge of the Silvies River on the north and the Donner und Blitzen River on the south into the Malheur Lake Division is contained in Plaintiff's Exhibits 52 and 52A, which constitute the report in full made by said L. T. Jessup as just stated. Said report shows the Silvies River had a mean annual discharge of 119,866 acre feet for the period 1903-1904 to 1929-1930, and the Blitzen River had a mean annual

discharge of 151,974 acre feet for the period 1908 to 1920. The annual discharge of these streams is hereby found to have been as shown by the said report.

The low water conditions existing since 1917 have not been caused in any considerable measure by the impounding of waters in reservoirs on the Silvies and Blitzen Rivers, or the use of those waters for irrigation. The lack of precipitation has been the chief cause of such low water conditions.

Harney and Malheur Lakes always have been, and are now, shallow lakes, the waters thereof being variable in area and depth, and for years prior to the commencement of this suit Harney Lake has been substantially dry. During most of each year from 1918 to 1931 except the years 1921, 1922 and 1928, the recession of the waters of Malheur Lake was practically complete.

On November 1, 1931, at Burns, Oregon, an inspection of the areas within the Meander Line Boundary was had by the Special Master, accompanied by counsel, the official stenographer, and engineers representing both the plaintiff and the defendant. At that time the entire area was dry and showed no signs in the soil of ever having been under water except about 400 acres in the Malheur Lake Division, which was to a negligible depth surrounded by about 1000 acres of mud. This area of, say, 1400 acres lay just north of the south meander line where it crosses Section 31, Township 26 South, Range 32 East, South of Malheur Lake (see Joint Abstract of Record, Volume II, pages 858-860), and just to the east of the Blitzen River which was then carrying or had shortly before carried waters from the Sodhouse Spring into Malheur Lake. The elevation of the 1400 acres varied from 4090 to 4092 feet above sea level, which was below the average elevation of the Neal meander 1895-1896 survey, which was 4093 as found in finding XXII.

XXI.

No one of the Divisions lying within the Meander Line Boundary was on February 14, 1859, and no one of them has since been navigable in fact, and neither trade nor travel did then or at any time since has or could or can move over said Divisions, or any of them, in their natural or ordinary conditions according to the customary modes of trade or travel over water; nor was any of them on February 14, 1859, nor has any of them since been used or susceptible of being used in the natural or ordinary condition of any of them as permanent or other highways or channels for useful or other commerce. The region thereabouts did not, nor did any of the Divisions on February 14, 1859, nor has it nor have they since produced commodities which would or could be transported by water, nor has it been nor have they been capable of producing commodities which would or could be transported by water, nor was said region nor any of said Divisions capable of sustaining a population to be served by water transportation.

XXII.

The line of ordinary or mean high-water at the time of the Neal Survey in 1895-1896 and on February 14, 1859 was at a mean elevation of 4093 feet above sea level and was so fixed by Neal.

Except in years of abundant precipitation and favorable runoff, water is not available to maintain a mean or average water surface elevation much above 4093 in the area within the Meander Line Boundary (Report of L. T. Jessup, Plaintiff's Exhibits 52 and 52A).

All of the lands within the five Divisions below the elevation of 4093, except those within the Narrows Division and Sand Reef Division which cannot be so described, are "lake bed land" (Bill of Complaint, par. I) and/or "the bed of lakes". (Amended Answer, par. I.) The terms

"lake bed land" and "the bed of lakes" in these findings are used interchangeably to indicate land underlying water up to the line of ordinary or mean high-water. All of the lands within the five Divisions above the elevation of 4093 are permanent lands and constitute islands and/or promontories.

Malheur Lake Division at 4093 (Depths)

With water throughout the Malheur Lake Division at a mean elevation of 4093 feet there would be stable island and/or promontory lands therein totaling 7991.6 acres and submerged lands totaling 39,678.8 acres making the 47,670.4 acres within the Division, classified as follows:

		Acres
(a)	Lands under water of 1 foot, or less	11,715.8
(b)	Lands under between 1 and 2 feet	10,126.6
(c)	Lands under between 2 and 3 feet	6,988.4
(d)	Lands under between 3 and 4 feet	10,821.2
(e)	Lands under between 4 and 5 feet	26.8
	Lands under water	39,678.8
	Lands above water surface	7,991.6
	Total	47,670.4

Malheur Lake Division (Lands Above 4093)

The lands above water surface, constituting islands and promontories totaling 7991.6 acres within the Division are made up of the following:

		Acres
(a)	Pelican Island	840.0
(b)	Cole Island	350.0
(c)	All other Islands	4,921.6
(d)	Promontories	1,880.0
	Total	7,991.6

The lands under water above aggregated are not compact bodies.

The Narrows Division at 4093 (Depths)

With water throughout The Narrows Division at a mean elevation of 4093 feet that area would be classified as follows:

		Acres
(a)	Lands under water of 1 foot, or less	36.4
(b)	Lands under between 1 and 2 feet	121.2
(c)	Lands under between 2 and 3 feet	74.0
(d)	Lands under between 3 and 4 feet	26.0
(e)	Lands under between 4 and 5 feet	16.8
	Lands under water	274.4
	Lands above water surface	21.2
	Total	295.6

With water throughout the Mud Lake Division at a mean elevation of 4093 feet the area would be classified as follows:

Mud Lake Division at 4093 (Depths)

		Acres
(a)	Lands under water 1 foot, or less	103.4
(b)	Lands under between 1 and 2 feet	181.0
(c)	Lands under between 2 and 3 feet	195.2
(d)	Lands under between 3 and 4 feet	282.4
(e)	Lands under between 4 and 5 feet	492.4
(f)	Lands under between 5 and 6 feet	123.6
	Lands under water	1378.0
	Lands above water surface	88.0
	Total	1466.0

With water throughout the Sand Reef Division at a mean elevation of 4093 feet the area would be classified as follows:

The Sand Reef Division at 4093 (Depths)

		Acres
(a)	Lands under water 1 foot or less	441.4
(b)	Lands under between 1 and 2 feet	659.6
(c)	Lands under between 2 and 3 feet	292.0
(d)	Lands under between 3 and 4 feet	136.0
(e)	Lands under between 4 and 5 feet	17.6
(f)	Lands under between 5 and 6 feet	18.4
	Lands under water	1565.0
	Lands above water surface	1227.0
	Total	2792.0

It is impossible to furnish a similar table in respect of Harney Lake because no survey or measurements necessary for the purpose were made or are available.

Appendix 16

is made up of tables based upon Plaintiff's Exhibits 3 and 4 which show all of the facts stated in this finding in respect of land and water surfaces and depths. (See "Special Master's Report": Volume 2.)

XXIII.

It is not true that by reason of the issuance of patents and/or grants of lands bordering on the Meander Line Boundary without any reservation of title to land or water within the Meander Line Boundary or by reason of any other fact or circumstance whatever, the United States as matter of intention or fact abandoned claim to any land or water within the Meander Line Boundary, but such abandonment, if it ever occurred, arose out of rules of law, if such rules of law existed, and not otherwise.

The United States never assented as a matter of intention or fact, in form or manner alleged in the Amended Answer, or at all, that the effect of the patents, grants and/or listings of the United States bordering on the Meander Line Boundary should be construed or given effect according to the laws of Oregon or be determined thereby and if any such assent existed it arose by operation of law pursuant to legal rules, if such existed, and not otherwise.

In *Oklahoma v. Texas,* 258 U. S. 574, 594-595, it is said:

> "Where the United States owns the bed of a non-navigable stream and the upland on one or both sides [or the bed of a non-navigable lake and the upland wholly encircling it], it, of course, is free when disposing of the upland to retain all or any part of the river bed [or lake bed]; and whether in any particular instance it has done so is essentially a question of what it intended. If by a treaty or statute or the terms of its patent it has shown that it intended to restrict the conveyance to the upland or to that and a part only of the river bed [or lake bed], that intention will be controlling[1]; and, if its intention be not otherwise shown, it will be taken to have assented that its conveyance should be construed and given effect in this particular according to the law of the State in which the land lies[2]."

"1. *Wilcox v. Jackson,* 13 Pet. 498, 516-517; *Irvine v. Marshall,* 20 How. 558; *Gibson v. Chouteau,* 13 Wall. 92, 99; *Utah Power & Light Co. v. U. S.,* 243 U. S. 389, 404; *Kean v. Calumet Canal Co.,* 190 U. S. 452, 460.

2. *Hardin v. Jordan,* 140 U. S. 371, 384; *Mitchell v. Smale,* 140 U. S. 406, 413-414; *Grand Rapids & Indiana R. R. Co. v. Butler,* 159 U. S. 87, 92; *Hardin v. Shedd,* 190 U. S. 508, 519; *Whitaker v. McBride,* 197 U. S. 510, 512, 515-516; and see *Railroad Co. v. Schurmeir,* 7 Wall. 272, 287, et seq."

The United States never asserted, nor intended to assert, to the State of Oregon, nor to the patentees of the

said United States, nor to their successors or assigns, nor any of them who accepted said patents relying thereon, nor to the world, that any conveyance, grant or patent of the United States should be construed or given effect according to the laws of the State of Oregon and/or be determined by its laws, and that if any such assent or intention or assertion is deemed to have been made by the United States, it was so made solely by force and effect of law pursuant to legal rule, if any such rule existed, and not otherwise.

XXIV.

Prior to about 1877 Malheur and Harney Lakes were separated by a sand reef about four miles to the southwest of what is known as the Narrows. Subsequent thereto, during a period of high water, this barrier was broken through and at divers times the waters of Malheur Lake, the Narrows, Mud Lake, and the Sand Reef Division became united with the lower water surface of Harney Lake by a channel or gap in the Sand Reef proper about 45 feet wide, but it is not true that by reason of the break in the Sand Reef the waters of Malheur Lake became united with the lower water surface of Harney Lake by a strait described in the Bill of Complaint as Mud Lake and the Narrows, and it is not true that unknown persons caused a cut or rift to be cut or broken in the top of the Sand Reef during high waters in Malheur and Mud Lakes, or that by reason thereof a current of great capacity was formed and vast quantities of water flowed through Malheur and Mud Lakes into Harney Lake, but it is true that a rift or cut occurred in 1881 due to natural conditions, and the above water conditions later ensued.

Subsequent to 1881 a large area adjoining the Meander Line Boundary became uncovered, but there is no evidence to show that this was due to a cut or rift in the Sand Reef in 1881, or at any other time, or that such

cut or rift was caused by persons or that it occurred other than through natural causes.

Prior to 1881 Harney Lake was and ever thereafter continued to be a sump for the evaporation of waters flowing therein from the Malheur Lake, the Narrows, the Mud Lake, and the Sand Reef Divisions.

There is no evidence to support the allegation in the Amended Answer that the Neal Survey of 1895-1896 was ordered owing to changed conditions consequent upon a break in 1881 in the Sand Reef, nor on account of mistakes or errors in the running of the 1877 meander line, except such as were disclosed in litigation and controversies reviewed in decisions rendered subsequent to 1895-1896, viz.: *French Glenn Live Stock Co. v. Springer,* 185 U. S. 47, and connected case, *French Glenn Live Stock Co. v. Colwell,* 185 U. S. 54, and *Pacific Live Stock Co. v. Armack,* 30 L. D. 521; *Lake Malheur,* 19 L. D. 439; *Lake Malheur,* 16 L. D. 257.

At the time of the commencement of this action and for a long period of time prior thereto the waters within the Meander Line Boundary were all shallow.

It is not true that prior to February 14, 1859, Mud Lake was a part of Harney Lake and/or before the same date had become separated from Harney Lake by a sand reef through the action of impending ice and of the winds and waves of the lakes, or from any other causes, nor that the Sand Reef prior to February 14, 1859, varied from about 5 to 10 chains in width or was about 20 feet in height, or that it is the identical Sand Reef referred to in the plaintiff's bill of complaint. (Amended Answer, Second Defense, pages 20-21, Paragraph II; Counterclaim, pages 42-43, Paragraph II.)

XXV.

The defendant alleges "that no portion of said beds below the meander line constitute relicted lands" (Amended Answer, page 4, ft.), and although the plaintiff did not allege to the contrary, the defendant denies "that there is or has been any permanent recession" (Amended Answer, page 15, tp.), and the counterclaim proceeds upon the same basis.

The United States has not argued whether the recession of waters is or is not permanent.

It is or may be to the interest of both plaintiff and defendant to maintain the position, that there are no relicted lands but no finding is made upon that question as it is not necessary to the disposition of this suit that there should be a finding thereon and as that question affects the intents of persons not parties to the action no finding is made.

XXVI.

By an Act approved by the Governor of Oregon and filed in the office of the Secretary of State, February 19, 1917, effective May 21, 1917, the legislative assembly of the State of Oregon enacted Chapter 278, General Laws of Oregon, 1917, p. 518, set out in the Amended Answer. Said statute has never been modified, altered or repealed, and is still in full force and effect.

By an Act approved by the Governor of Oregon and filed in the office of the Secretary of State, February 25, 1921, effective May 24, 1921, the legislative assembly of the State of Oregon enacted Chapter 280, General Laws of Oregon, 1921, page 521, set out in the Amended Answer. Said statute has never been modified, altered or repealed, and is still in full force and effect.

By an Act approved by the Governor of Oregon and filed in the office of the Secretary of State, February 26,

1923, effective May 23, 1923, the legislative assembly of the State of Oregon enacted Chapter 282, General Laws of Oregon (1923) page 435, set out in the Amended Answer. Subdivision (h) of said statute was amended by Chapter 282, General Laws of Oregon, 1931, page 358 (approved by the Governor of Oregon and filed in the office of the Secretary of State, March 6, 1931, effective June 4, 1931) to read as in said latter act and in the Amended Answer stated. Said statute of 1923 has never been modified, altered or repealed except as stated, and is otherwise in full force and effect, and said statute of 1931 has never been modified, altered or repealed, and is still in full force and effect.

XXVII.

The Narrows by which Malheur and Mud Lakes are connected may be described as a waterway having somewhat the configuration of a stream. Its length is 2.12 miles and its average width 17.4 chains; it is narrowest at the Bridge (a point well known locally) where the width is 7.0 chains, and it is widest at the point where Malheur empties therein, where the width is 32.8 chains. The area of the Narrows is 295.60 acres.

The waters within the Meander Line Boundary are wholly inland, have no outlet and are intrastate.

All of the facts stated on pages 8, 9, 10, and 68 to 72 of the Report, supra, respecting the five Divisions are true.

The title, interests and estates within the Meander Line Boundary claimed by the United States and Oregon severally are inconsistent with claims which might be asserted by the individual upland patentee proprietors, who are not parties to this suit.

A list of meandered lakes in Oregon described as navigable and non-navigable will be found in Joint Abstract of Record, Volume II, pp. 875-878, coupled with

Ganong's conformatory table [pp. 878-882], and Jewett's general description of the lakes [pp. 882-889].

The facts respecting the 67.37 acres within the Harney Lake Division which Oregon used as base for lieu lands elsewhere are correctly stated supra pp. 55, 71 and on Appendix 18, Report of Special Master, Volume 2, p. 96, which is an inset facing page 70 supra.

XXVIII.

Before the making of these findings and seasonably, Oregon made a request for certain findings of fact and conclusions of law as below stated, and the subject-matter of the requests have been dealt with herein to the extent that seems appropriate. The request follows:

The State of Oregon respectfully requests you to make certain findings of fact and incorporate them in your report as follows:

(a) At the date of the admission of the State of Oregon into the Union on February 14, 1859, that portion of the area involved within what is designated herein as the Mud Lake Division within the Meander Line Boundary was susceptible of use for navigation as herein stated and ever since the advent of the white man into Harney County except during the dry periods described in these findings, such areas have been susceptible of such use and have actually been used for public purposes by the public generally. Such use by the public consisted of skating on the ice in winter, of navigating such waters in row boats and skiffs for pleasure, recreation, gathering of eggs, hunting, trapping and transporting over such waters wild water fowl and fur bearing animals; such boats and skiffs were propelled in some one or more of the following methods: by poles, paddles, oars, sails, outboard motors and marine engines; the United States after the Executive Order transported members of the public over such waters for the purposes of viewing the

fur bearing animals and the breeding and nesting habits of wild migratory and native water fowl which made such areas their habitat for such purposes. Great quantities of fur bearing animals were trapped within such Division and transported over the waters thereof in such boats and skiffs, and the pelts thereof were then conveyed by public roads adjacent to such Meander Line Boundaries to other improved highways and railroads and shipped to trading points and became the subject of interstate commerce.

(b) There has been no permanent reliction of lands nor permanent recession of waters within the Mud Lake Division.

Based upon such findings of fact hereinbefore requested, the State of Oregon respectfully requests you to make conclusions of law as follows:

(1) I find that at the date of admission of the State of Oregon into the Union on February 14, 1859, and ever since, that the waters within the Meander Line Boundary of the Mud Lake Division herein described were and still constitute navigable and public waters.

(2) Based upon the findings herein contained, I find that the title of the bed of the Mud Lake Division within the Meander Line Boundary thereof as described in these

At the same time Oregon made requests for findings and conclusions of law to like effect as the requests above stated in respect of each of the others of the five Divisions, i. e., the Malheur Lake Division, the Narrows Division, the Sand Reef Division and the Harney Lake Division.

claims which are herein made by the United States. (Amended Answer, p. 30 foot, p. 51 middle.)

XXX.

It is not true (Amended Answer, Counterclaim, par. V, pp. 44-45) that at the time of the Admission of Oregon into the Union or at any time thereafter Malheur, Mud and Harney Lakes were or that any of them, was a body of water varying in depth different from the depths elsewhere herein stated or that any portion of any of them ever had a depth of seventeen feet or any depth exceeding about six feet and then only in the deepest portions. No one of said lakes was of the maximum depth alleged in the Amended Answer during any season of high-water.

It is not true that on February 14, 1859, or at any time thereafter, the waters of Malheur Lake and Mud Lake at ordinary recurring seasons of high water stood substantially at a level near the top of the Sand Reef. (Amended Answer p. 22.)

It is not true that if the Silvies and Blitzen Rivers were allowed to flow into the lakes as they had been wont to flow, or without diversion for irrigation, the waters of said lakes would at the present time be at or beyond the Meander Line Boundary.

It is not true that mean or ordinary high water during many years passed has reached the Meander Line Boundary. (Amended Answer, pp. 15, 32, 44-45.)

It is not true that the entire bed of any of said lakes is or has been covered by water in each recurring season, but it is true that with waters at the ordinary high-water mark the entire bed within the Meander Line Boundary would be covered.

XXXI.

The shores or banks of Malheur Lake are for the most part undefined and untraceable upon the ground, although both defined and traceable over a portion thereof. The shores and banks of Mud and Harney Lakes are for the most part defined and traceable.

It is not true that for many miles or for great portions of the distances around the lakes the banks are abrupt or distinct, but it is true that vegetation such as usually grows in shallow lakes or in the shallower parts of lakes has grown and does grow within the Meander Line Boundary.

XXXII.

It is not true that the Silvies River or the Donner und Blitzen River ever were, or that either of them ever was or is now in its natural state used or susceptible or capable of being used as a highway for commerce over which trade and/or travel are or may be conducted in the customary mode of trade or travel on water to, from or between any points within the Meander Line Boundary. (Amended Answer pages 23-24.)

XXXIII.

It is not true that any of the waters dealt with in the Amended Answer, at any time has been or now is used to carry products by row boats or flat boats or gasoline launches, or to transport any products of commerce or to afford means of travel in any of the area here involved or in the region adjoining the same. (Amended Answer page 24.)

XXXIV.

It is not true that any portion of the area within the Meander Line Boundary, either was or would have been under any conditions whatever, or particularly if there had been a full flow from the rivers discharging therein, capable or susceptible of being used as highways for commerce over which trade or travel might be conducted in the customary modes of trade and/or travel on water. (Amended Answer page 24.)

It is true that from the admission of Oregon into the Union game birds were found therein, and vast numbers

in earlier times found their habitat there, but only negligible quantities of game fish were ever found therein.

XXXV.

It is not true that until August 18, 1908, large numbers of persons used the lakes and the waters thereof and traversed the same with row boats or gasoline launches for the purpose of fishing or hunting or traveling thereon, although there were occasional uses of the same for fishing and hunting by the neighborhood in periods of high water but not for purposes of commerce except trapping for a short time; and it is not true that the area within the Meander Line Boundary, or any part thereof, at the time of or prior to the admission of Oregon into the Union was used or capable or susceptible of being used to any practical or commercial degree for sailing, rowing, fishing, fowling, trapping, bathing, skating, the taking of water for domestic or agricultural purposes, or the cutting of ice or the transportation of fish or game or the products of the field or forest.

XXXVI.

It is not true that since the Executive Order of August 18, 1908, the plaintiff has caused its agents and/or wardens, to patrol the areas within the Meander Line Boundary with row boats or gasoline launches, or to cause them to conduct and carry great numbers of the public over the area within the Meander Line Boundary, or portions of the river flowing therein, in gasoline launches for pleasure and/or for the purpose of sightseeing, but row boats and two gasoline launches have been used periodically and in time of high water in relatively small portions of the Malheur Lake Division and rowboats have been used occasionally on Mud and Harney Lakes in periods of high water.

CONCLUSIONS OF LAW.

And as the conclusions of law from the foregoing facts, it is declared that the plaintiff is entitled to a decree in terms as annexed.

[Inasmuch as in the Summary of the Report, supra pp. 66-72, all questions of law which seem to be involved are dealt with, there is seemingly no reason to repeat them.]

DECREE (RECOMMENDATION FOR).

[This decree is modeled upon those in *Oklahoma v. Texas*, 259 U. S. 565, and *United States v. Utah*, 283 U. S. 801.]

[Title of Court and Cause.]

Decree.

This cause came on to be heard by this Court upon the exceptions of the parties hereto to the Report of the Special Master,

Now, therefore, for the purpose of carrying into effect the conclusions of the Court as stated in its opinion dated ....., it is ordered, adjudged and decreed that:

1. At the time of the admission of the State of Oregon into the Union February 14, 1859, and for a long time immediately prior thereto the United States of America was the owner in fee in, and entitled to the possession of (a) all of the area involved herein, i. e., 81,786 acres of unsurveyed land (including the tract of 115.92 acres mentioned in findings VI and VII), within the Meander Line Boundary and divided for the purposes of

this case into five divisions, (1) Malheur Lake; (2) Narrows; (3) Mud Lake; (4) Sand Reef and (5) Harney Lake; (b) the area within the Executive Order Boundary embracing all the smallest legal subdivisions bordering upon the Meander Line Boundary; (c) all of the smallest legal subdivisions bordering on the above 115.92 acres, and (d) all of the surrounding region for many miles. The area within the Meander Line Boundary (which includes the above 115.92 acres) and the five divisions aforesaid are specifically described in Appendix 2 of the Report of the Special Master, Volume 2, pp. 7-25.

2. No part of said 81,786 acres constituted navigable waters on February 14, 1859, and no part thereof passed from the United States of America to the State of Oregon upon her admission into the Union.

3. At the admission of the State of Oregon into the Union there were stable lands constituting islands or promontories within the area involved; and all lands above the water surface elevation of 4093 on that day were stable lands and ever since have been and now are owned in fee simple absolute by the United States of America (except stable lands within the Narrows Division, if any).

4. The United States of America has never disposed of any part of the area involved in terms, nor at all, except such disposition as may have resulted (as matter of law) from patents, grants and listings of lands bordering on the Meander Line Boundary and not within the area involved.

5. The State of Oregon has no right, title or interest in or to any part of the area within the Meander Line Boundary save such as is incidental to her ownership of patented lands on the Meander Line Boundary of subdivision B of the Narrows Division (between the Bridge and Mud Lake Division), and upon the Meander Line Boundary of the Mud Lake Division and in the ratio that the frontages of her riparian and/or littoral lands thereon bear to the whole frontage of each, i. e., of subdivision B

of the Narrows Division and of the Mud Lake Division severally, allowing for equitable considerations which may affect this ratio.

6. Prior to this suit the United States of America had disposed of lands bordering on the Meander Line Boundary in each of the five Divisions, the frontages of which bore to the entire frontage upon each of the Divisions the percentages respectively as follows: in Malheur Lake Division, 79.80%; in the Narrows Division, 100%; in Mud Lake Division, 100%; in the Sand Reef Division, 15.08%; in Harney Lake Division, 12.09%. Said United States retained and owned at the commencement of suit and now owns lands bordering upon each Division with frontages which bear to the entire frontage of each Division respectively the percentages which follow: 20.20% in the Malheur Lake Division; 84.92% in the Sand Reef Division; and 87.91% in the Harney Lake Division.

7. Included in the lands disposed of by the United States of America upon subdivision B of the Narrows Division and the Mud Lake Division were indemnity lands which had been listed to and had been sold by Oregon before the commencement of the suit. The indemnity lands bordering on the Meander Line Boundary in the Narrows Division constituted 22.41% of the entire frontage of the uplands on both banks; of this 14.64% is in subdivision A and 7.77% in subdivision B. The patented lands bordering on the meander line in the Narrows Division constituted 77.59% of the entire frontage, of which 36.52% is in subdivision A and 41.07% in subdivision B. The frontages of indemnity lands bordering on the Meander Line Boundary within the Mud Lake Division constitute 32.40%, and the patented lands 67.60%, of the entire frontage of this Division. The frontage of lands on Mud Lake is 806.94 chains of which 261.47 chains represent indemnity lands, 72.31 chains represent patented land owned by Oregon and 473.16 chains patented land owned by individuals.

8. The State of Oregon is the owner in fee simple absolute of the bed of subdivision B of the Narrows Division to the center line thereof opposite her ownership of upland on the banks.

The frontage of 159.67 chains owned by the State of Oregon along the meander line in subdivision B of the Narrows constitutes 86.85% of the total frontage in that subdivision, namely, 183.85 chains. Said frontage of 159.67 chains is made up of (a) frontage of 70.52 chains on the north boundary and (b) frontage of 89.15 chains on the south boundary.

The upland owned by the State of Oregon on the Narrows Division is wholly on subdivision B (between the Bridge and Mud Lake Division). No part thereof is on subdivision A (between the Bridge and the Malheur Lake Division).

The total frontage on the Division (both subdivisions A and B) is 376.45 chains made up of 192.60 chains of frontage on subdivision A and 183.85 chains of frontage on subdivision B. The total frontage on the north boundary of the Division is 204.37 chains, made up of 107.17 chains on subdivision A and 97.20 chains on subdivision B. The south boundary of the Narrows Division has a frontage of 172.08 chains, made up of 85.43 chains on subdivision A and 86.65 chains on subdivision B.

9. The United States of America has no right, title or interest whatever in the area known as the Narrows Division (without prejudice however to rights of easement reserved from determination herein).

[The question whether the rule of *Hardin v. Jordan* applies to indemnity lands is of no importance here for the matter is governed by Section 2476 R. S.]

10. The United States of America is forever enjoined from asserting any estate, right, title or interest against the estate, rights, titles and interests herein owned and

held by the State of Oregon in the Narrows Division, as determined in paragraph 8 of this decree.

11. The State of Oregon is the owner of a rateable portion of the bed of Mud Lake Division to the extent of 8.99% of said bed (as 72.31 chains bears to 806.94 chains) allowing for equitable considerations which may effect this ratio.

12. The United States of America is forever enjoined from asserting any estate, right, title or interest against the estates, rights, titles and interests owned and held by the State of Oregon in the Mud Lake Division, as determined in paragraph 11 of this decree.

[The United States of America disposed of 100% of the uplands on the Mud Lake Division, including indemnity lands. The question whether those indemnity lands participate in partition of the bed under the rule of *Hardin v. Jordan* or not is left open by paragraph 12 as it deals only with the rights of the State of Oregon in that division.]

13. The State of Oregon has no right, title or interest whatever in or to any part of the area within the Meander Line Boundary except as determined in paragraphs 8 and 11 of this decree.

14. The United States of America is the owner in fee simple absolute, in, and entitled to the possession of all the area here involved, i. e., that within the Meander Line Boundary except such aliquot parts thereof as may have been, as matter of law, transferred by the United States of America by patents of lands bordering on the Meander Line Boundary, but as neither said patentees, nor their successors in interest (except in so far as the State of Oregon is a successor in interest of some of the patentees), are parties to this suit, no determination is herein made in respect of the rights, titles and interests acquired by said patentees in the areas within the Meander Line Boundary.

15. The State of Oregon is forever enjoined from asserting any estate, right, title or interest in or to any of the area within the Meander Line Boundary except the estates, rights, titles and interests determined in paragraphs 8 and 11 of this decree to be owned by said State.

16. The area here involved, i. e., within the Meander Line Boundary and the five Divisions above mentioned, are all situate in Harney County, State of Oregon, and are described as follows [here insert description from Appendix 2, Report of Special Master, Volume 2, pages 7-25].

17. The apportionment of the beds of the meandered areas amongst upland proprietors and the rights of persons not parties to this suit are not determined here.

18. This Decree shall neither bind nor inure to the benefit of third persons not parties to this suit except the patentees of the United States of America as such, and their successors in interest, who shall have the benefit of this Decree as against the claims of the State of Oregon in conflict with the titles of the United States of America herein determined to have existed prior to disposal of the uplands.

19. The counterclaim of the State of Oregon is hereby dismissed except in respect of matters determined in paragraphs 8 and 11 of this Decree.

20. The determination of the ownership of the area involved made by this Decree is subject to any easements (for the flow of water from one subdivision to another or others, or for any other purposes) which may exist.

21. Either party to this suit may apply to the Court for further orders and directions at the foot of the Decree.

....., 1934.

(Supplement Follows.)

Supplement to Report of Special Master.

This supplement contains:

(1) Order, April 13, 1931, appointing Special Master;

(2) Veto by President Hoover, June 6, 1930, of H. R. 1198, whereby the United States consented to be a party defendant in a suit to be brought in the District Court for Oregon to determine all rights in the area involved;

(3) General Laws of Oregon dealing with Lakes, Navigable and Non-Navigable.

Chapter 278, 1917, page 518 effective May 21, 1917;
Chapter 280, 1921, page 521 effective May 24, 1921;
Chapter 282, 1923, page 435 effective May 23, 1923;
Chapter 228, 1931, page 358 effective June 4, 1931.

(4) A Summary of evidence relating to boats and boating presented upon the issue of navigability.

Order April 13, 1931, Appointing Special Master.

"Supreme Court of the United States

No. 22 Original, October Term, 1930

The United States of America,
Complainant,
vs.
The State of Oregon.

ORDER.

On consideration of the motion by the United States for the appointment of a Special Master to take the evidence in this case and report the same to this Court with his findings of fact, conclusions of law, and recommendations for a decree,

It is now here ordered that Garret W. McEnerney, of San Francisco, State of California, be, and he is hereby,

appointed a Special Master with the powers of a Master in Chancery, as provided in the rules of this Court, to take the evidence viva voce or by deposition and to report the same to the Court with his findings of fact, conclusions of law, and recommendation for a decree—all subject to examination, consideration, approval, modification, or other disposal by the Court. The Special Master shall have authority (1) to employ competent stenographic and clerical assistants, (2) to fix the times and places of taking the evidence and to limit the time within which each party shall present its evidence, and (3) to issue subpoenas to secure the attendance of witnesses and to administer oaths. Depositions of witnesses residing at any place may be taken upon stipulation of the parties, or by the mode provided in the Rules of Practice for the Courts of Equity of the United States, or as provided by Sections 863, 865-7 of the Revised Statutes for the taking of depositions de bene esse in the District Courts, or as may be directed by the Master. They may be returned in the first instance to the Master. When the Special Master's report of his findings of fact, conclusions of law, and recommendations for a decree is completed the Clerk of the Court shall cause the same to be printed; and when the same is presented to the Court in printed form the parties will be accorded a reasonable time, to be fixed by the Court, within which to present exceptions. The Special Master shall be allowed his actual expenses and a reasonable compensation for his services to be fixed hereafter by the Court. The allowances to him, the compensation paid to his stenographic and clerical assistants, and the cost of printing his report shall be charged against and be borne by the parties in such proportions as the Court may hereafter direct.

If the appointment herein made of a Special Master is not accepted, or if the place becomes vacant during the recess of the Court, the Chief Justice shall have authority to make a new designation which shall have the same effect as if originally made by the court herein.

April 13, 1931."

Veto by President Hoover, June 6, 1930, of H. R. 1198.

71st Congress, 2d Session } HOUSE OF REPRESENTATIVES { Document No. 455

VETO MESSAGE RELATING TO TITLE TO CERTAIN LANDS IN HARNEY COUNTY, OREG.

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

H. R. 1198 WITHOUT APPROVAL; ALSO STATEMENT FROM THE ATTORNEY GENERAL STATING THE REASONS THEREFOR

JUNE 6, 1930.—Referred to the Committee on the Judiciary and ordered to be printed with accompanying papers

To the House of Representatives:

I am returning herewith the bill, H. R. 1198, without approval. I attach hereto a statement from the Attorney General stating the reasons therefor.

HERBERT HOOVER.

THE WHITE HOUSE, *June 6, 1930.*

DEPARTMENT OF JUSTICE,
Washington, D. C., June 6, 1930.

MY DEAR MR. PRESIDENT: I have the honor herewith to return H. R. 1198, a bill "To authorize the United States to be made a party defendant in any suit or action which may be commenced by the State of Oregon in the United States District Court for the District of Oregon, for the determination of the title to all or any of the lands constituting the beds of Malheur and Harney Lakes in Harney County, Oreg., and lands riparian thereto, and to all or any of the waters of said lakes and their tributaries, together with the right to control the use thereof, authorizing all persons claiming to have an interest in said land, water, or the use thereof to be made parties or to intervene in said suit or action, and conferring jurisdiction on the United States courts over such cause."

I recommend that this bill be disapproved.

There appears to be a controversy between the State of Oregon and the United States as to whether these lakes are navigable. If navigable the title to the beds was vested in the State upon its admission to the Union. If nonnavigable, the title to the beds of the lakes remained in the United States and is still the property of the United States unless it has passed to grantees of the United States. Lands adjacent to the lakes formerly constituting part of the public domain have been patented by the United States to various individuals. These patentees claim that the lakes are nonnavigable and that the title did not pass to the State upon its admission to the Union. They also contend that patents issued by the United States carry title to the beds of the lakes. There is a controversy between these patentees and the United States and between patentees and the State. The purpose of this bill seems to be to provide a tribunal by which all the parties to this three-cornered controversy may have their rights determined in one suit.

The bill purports to confer jurisdiction on the United States district court to entertain a controversy between a State and its own citizens for the decision of questions as to riparian rights and as to rights in the waters of these lakes which are local in character and are to be determined by local law. The constitutional jurisdiction of the Federal courts does not include such a controversy, and it is doubtful, to say the least, whether such jurisdiction would be constitutionally conferred upon the district courts by this act.

The bill provides that the suit may be instituted by the State of Oregon. It also provides that once the suit is instituted persons claiming interests in the lands and who may not have been made parties defendant by the State may intervene and in effect become plaintiffs against the State, asserting claims against it. The effect of the initiation of the suit by the State would therefore be to subject it to what amounts to suits by intervening plaintiffs. The effect of the institution of the suit by the attorney general of Oregon would be to waive the sovereign immunity of the State to suits by intervenors. My attention has not been called to any statute of the State of Oregon which clearly authorizes the attorney general of that State on behalf of the State to waive its sovereign immunity in this way, and the question exists whether State legislation may not be necessary to make this act effective.

There is still another objection to the bill and that is that it turns over to the State the initiative and conduct of litigation involving water rights and public lands in which the United States is interested. I know of no reason why that should be done. It has not been the practice of the past, and if the principle of this bill is adopted it would result in legislation applicable to other cases turning over to others the initiative and conduct of suits involving controversies over riparian rights and water rights in which the United States is interested. Tribunals already exist having jurisdiction to determine these controversies. The Supreme Court of the United States has jurisdiction to entertain suit by the United States against the State of Oregon to try the title to the beds of these lakes and to determine whether they are navigable and whether the title passed to the State upon its admission to the Union. The United States district court also has jurisdiction to entertain suit by the United States against individuals

holding under patents from the United States and which would determine whether any part of the beds of the streams passed to the patentees if the lakes are nonnavigable. There might be some advantage if a tribunal existed in which all of the parties might appear in one suit, but because of these questions as to the validity and effect of this bill, instead of avoiding confusion and simplifying litigation this bill if it becomes a law would raise new controversies and increase the confusion. If the existing facts are such as to show a substantial controversy over these matters, the proper course in my opinion is for the United States to bring a suit against the State of Oregon in the Supreme Court to try the question as to navigability. Even though the individual patentees or others claiming an interest in the beds of the lakes or in the waters thereof are not parties to such a suit, the practical effect of the decision of the Supreme Court would be to settle the question of navigability. So far as the controversy between the patentees and the United States is concerned, following the determination of such a suit in the Supreme Court or pending it, suit could be brought in the United States district court against the individuals involved. The wise course for all concerned is to disapprove this bill and leave initiation of the litigation to the United States and let it be determined in tribunals which now have jurisdiction.

Respectfully,

WILLIAM D. MITCHELL,
Attorney General.

The PRESIDENT, *The White House.*

[H. R. 1193. Seventy-first Congress of the United States of America; at the second session, begun and held at the city of Washington on Monday, the second day of December, one thousand nine hundred and twenty-nine]

AN ACT To authorize the United States to be made a party defendant in any suit or action which may be commenced by the State of Oregon in the United States District Court for the District of Oregon, for the determination of the title to all or any of the lands constituting the beds of Malheur and Harney Lakes in Harney County, Oregon, and lands riparian thereto, and to all or any of the waters of said lakes and their tributaries, together with the right to control the use thereof, authorizing all persons claiming to have an interest in said land, water, or the use thereof to be made parties or to intervene in said suit or action, and conferring jurisdiction on the United States courts over such cause

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the United States of America does hereby consent to be made a party defendant in any suit or action which may be commenced by the State of Oregon in the United States District Court for the District of Oregon to determine the respective rights of the United States, the State of Oregon, and any person or persons claiming any title to or interest in, or the right to the use of the lands, or any of them, constituting the beds of Malheur and Harney Lakes in Harney County, Oregon, and lands riparian thereto, and the waters of said lakes and of their tributaries, or of any, either, or all of them; that any person claiming to have an interest in said lands, waters, or the use thereof may be joined as plaintiff or defendant, or may intervene in said suit or action. All parties to such suit shall have the same procedural rights, including rights of appeal and appellate writs, as in other similar cases between private litigants, and shall be subject to the same jurisdiction of the said courts, and be bound and concluded by their decisions to the same extent.

NICHOLAS LONGWORTH,
Speaker of the House of Representatives.

CHARLES CURTIS,
Vice President of the United States and President of the Senate.

○

General Laws of Oregon Dealing With Lakes, Navigable and Non-navigable.

Laws of 1917, page 518.

Chapter 278

AN ACT

Declaring the title to the beds of navigable lakes, not already acquired by any person, firm, or corporation, to be in the state of Oregon; providing that the state may use and dispose of the same, and preventing persons in the future from acquiring title thereto, except in the manner provided by law.

Be It Enacted by the People of the State of Oregon:

Section 1. The title to the beds of all navigable lakes in this state now existing or which may have been in existence in 1859, when the state was admitted to the Union, or at any time since said date, and which has not become vested in any person, firm or corporation, is vested in and claimed by the State of Oregon, and the State of Oregon is hereby declared to be the owner of the beds of such lakes, and may use and dispose of the same in such manner as now is, or may hereafter be, provided by law.

Section 2. After this act takes effect, no person, firm or corporation shall acquire any right, title or interest in or to the beds of any such navigable lakes, or any part thereof, by reliction or otherwise, or by reason of the lowering or drainage of the waters of such lakes, except in the manner which now is, or may hereafter be, provided by law.

This Act was approved by the Governor and filed in the office of the Secretary of State, February 19, 1917, effective May 21, 1917, has never been modified, altered or repealed, and is still in full force and effect.

Laws of 1921, page 521.

Chapter 280

AN ACT

Asserting the title of the state of Oregon to lands constituting the beds of all lakes wholly or partially within the state of Oregon which have been meandered by the United States surveys, and the public character of such lakes, excepting nonnavigable lakes within certain drainage districts (and) providing for the interpretation of this act.

Be It Enacted by the People of the State of Oregon:

Section 1. *Navigable or Public Waters.* Any and all lakes wholly or partially within the state of Oregon which have been meandered by the United States surveys, are hereby declared to be navigable and public waters, and the waters thereof are hereby declared to be of public character, and the title to the bed and land thereunder, including the shore or space between ordinary high and low water marks and between ordinary high and low water lines, which are not included in the valid terms of a grant or conveyance from the state of Oregon, is hereby declared to be in the state of Oregon, and the state of Oregon hereby asserts and declares its sovereignty over the same and its ownership thereof; provided, however, that the provisions of this act shall not apply to any nonnavigable lakes lying within the boundaries of any duly organized and incorporated drainage district which was in existence on January 1, 1921.

Section 2. Nothing in section 1 of this act shall be construed as impairing the title of any upland or riparian owner or owners to or any vested rights in land which has heretofore been added by natural accretion or reliction to the lands of such upland owner or owners.

Section 3. It is hereby declared that there is and shall hereafter be no vested rights in or to any future accretion or reliction to the lands of any upland or

riparian owner or owners on any such lake or public waters and after this act takes effect no person, firm or corporation shall acquire any right, title or interest in or to the beds of any such public waters or any part thereof by reliction, accretion or otherwise, or by reason of the lowering or drainage of the waters of such lakes, except in the manner which now is, or may hereafter be provided by law; provided further, however, that upon the drainage of such lakes aforesaid, the title of owners of land riparian to such lakes which have heretofore or may be hereafter drained under any of the provisions of the laws of the state of Oregon is hereby declared to extend to so much of the bottom or bed of such lake or lakes which have or which may be hereafter reclaimed by such drainage as is required to fill out the least fractional subdivision or subdivisions of any section owned by such riparian owners and which is rendered fractional by the meander line of such lake or lakes; and the title of said owners shall be so limited when the waters of said lake or lakes receding, because of such drainage, have uncovered or shall hereafter uncover the bed thereof; provided further, however, that, where by reason of natural accretion or reliction such fractional subdivision or subdivisions of such upland owners shall have been heretofore filled out thereby, such upland owners shall hold to the line of such lands as the same have been extended by such natural accretion or reliction. Lands which are covered at ordinary high water at ordinarily recurring seasons by the waters of any such lakes or public waters as defined in section 1 of this act, or from which the waters of any such lakes or public waters have not at ordinarily high water permanently receded, shall not be deemed or held to be accreted or relicted lands, but the same and all accretions and relictions hereafter occurring or formed over any of the lands of the state of Oregon, as hereinbefore provided, shall be and remain the property of the state of Oregon, and may be by it leased, demised, sold or disposed of in the manner now or hereafter provided by law.

Section 4. The state land board of the state of Oregon in the name of said state and for its use and benefit shall have the power to acquire and secure by purchase, gift, condemnation or otherwise, any and all riparian rights which may, by any court of competent or final jurisdiction, be held to be owned by or vested in any upland or riparian owner on any of said lakes or public waters, and shall have the power to institute such suits or actions as may be necessary in such condemnation proceedings and shall proceed in the manner and have the powers provided by law for the condemnation of property for the use or benefit of the state of Oregon.

Section 5. It is further provided that the several provisions and clauses of this act shall be deemed separate and severable, to the end that in the event any provisions, clause or clauses, or any portion of this act shall be held to be invalid or inoperative, (that) it shall not affect the remainder of this act, and the remaining portion or portions thereof shall be and remain in full force and effect and be deemed valid and operative.

Section 6. All persons who are qualified to become entrymen under the homestead laws of the United States of America and to secure patents to lands under such laws and who have heretofore and prior to January 1, 1921, in good faith settled upon lands within the meander lines of such lakes or other lakes returned as navigable by the United States surveys and who, on January 1, 1921, by reason of settlement, cultivation and improvements on any such lands would be entitled to patent from the United States of America if such lands were open or subject to homestead entry, shall be, and they are hereby, given a preference right to purchase from the state of Oregon such lands so settled upon by them, not exceeding 160 acres for any one person, upon such terms and at such prices and within such times as shall be fixed by the state land board of the state of Oregon; provided further, that owners of the upland bordering upon such ordinary high water mark shall

have a preference right to purchase, at the best price bid, state lands as herein defined and riparian to their said lands, and not exceeding 160 acres, in addition to the lands herein granted them by the provisions of this act.

This Act was approved by the Governor and filed in the office of the Secretary of State, February 25, 1921, effective May 24, 1921, has never been modified, altered or repealed, and is still in full force and effect.

Laws of 1923, page 435.

Chapter 282

AN ACT

To provide for the disposal of lake-bed lands to squatters and riparian owners, authorizing the state land board to make rules and regulations, enter into agreements with the federal government affecting certain lands, title to which is in dispute, and expend certain funds in carrying out such agreements.

Be It Enacted by the People of the State of Oregon:

Section 1. (a) Any person who has in good faith settled upon lands within the meander lines of any lake as defined in chapter 280, General Laws of Oregon, 1921, and who, on January 1, 1921, actually resided thereon and who has maintained his residence thereon for at least five years immediately prior to such date, and who has complied with the requirements of settlement, residence, cultivation and improvement, specified for homestead entrymen under the homestead laws of the United States, and which would be sufficient to acquire title by patent if such lands were subject to homestead entry by qualified homestead entrymen, shall be entitled upon proof of such facts to the satisfaction of the state land board of the state of Oregon, to a deed from such state, conveying and granting such lands not exceeding 160 acres without cost; and in addition thereto, such person shall have a preferential right to purchase from the state of Oregon 160 acres of

additional lands, chiefly valuable for agricultural purposes.

(b) Any person who has not resided on any such lake-bed lands for five years immediately prior to January 1, 1921, but who has purchased the improvement or possessory rights or claims of a prior occupant, and whose residence and possession when tacked to that of such prior occupant shall have extended for a period of not less than five years immediately prior to such date, shall have a preferential right to purchase such lands, not exceeding 160 acres, the price of which shall be fixed without reference to the value of the improvements thereon.

(c) The owners of lands riparian to Malheur and Mud lakes, in Harney County, Oregon, shall be granted title to so much of the bottom or bed of such lakes as is required to fill out the least fractional subdivision or subdivisions of any section owned by such upland owner or owners, and which is rendered fractional by the meander line of such lakes, in addition to the rights recognized by chapter 280, Laws of Oregon of 1921, to any natural accretion or reliction which has heretofore been added to the lands of such upland owner or owners. Owners of any upland bordering upon such meander lines shall have a preferential right to purchase, in addition, 160 acres of such state lands, chiefly valuable for agricultural purposes.

(d) All of such lands granted or which may be sold or conveyed by the state, shall be granted and conveyed in a reasonably compact area, to be determined by the state land board.

(e) All sales of such state lands shall be at prices fixed by the state land board, and no more than 320 acres shall be sold or conveyed to any one person.

(f) Settlers within the meander line of any lake or lakes specified by said chapter 280, General Laws of Oregon, 1921, shall have the first preferential right, and the state land board shall, so far as may be practicable, work out the various preferential rights by securing to each, all the lands which would

be most advantageously used by such several persons. In case of conflict, the state land board shall give the parties a reasonable time in which to agree, and in the event that they cannot agree, the state land board shall decide the matter and make conveyances as it shall deem just and equitable, and its decision in the matter shall be final.

(g) The state land board may adopt such reasonable rules and regulations as it shall deem necessary or expedient in the administration of this act, and shall fix the time within which such preferential rights shall be exercised.

(h) In the event that the federal government claims title or interest in any of such lake-bed lands, the same shall not be conveyed or otherwise disposed of, or preferential right therein accrue until such claim is settled, and the state land board is hereby authorized and empowered to enter into such agreements with the federal government affecting such lands as it deems best in the interest of the public, and in carrying out such agreements the board may utilize the proceeds from the sale of such lands, title or interest in which is claimed by the federal government; provided, that nothing herein contained shall be deemed to empower or authorize the state land board of Oregon or any other agency of the state to enter into any agreement which will divest any person or corporation of any water rights acquired under the laws of the state of Oregon or otherwise.

Section 2. Any person who shall elect to take or accept any deed from the state of Oregon under the provisions of this act or chapter 280, General Laws of Oregon, 1921, to any lake-bed lands, shall be deemed to take the same in lieu of any claim to any other lands within the meander line of any such lake in which such deeded lands shall lie, and shall not thereafter be permitted to maintain in any court any claim to any lands inside the meander line of such lake other than to the lands conveyed to such person or persons by deed from the state of Oregon under the

provisions of this act or said chapter 280, Laws of 1921, or which such person or persons shall acquire in good faith from a grantee or purchaser from the state of Oregon under said acts.

This Act was approved by the Governor and filed in the office of the Secretary of State, February 26, 1923, effective May 23, 1923. Subdivision (h) above was amended by General Laws of Oregon, 1931, page 358, Chapter 228, infra. Otherwise said Act of February 26, 1923, has never been modified, altered or repealed, and is still in full force and effect.

Laws of 1931, page 358.

Chapter 228.

This Chapter amends subdivision (h) of General Laws of Oregon, 1923, page 435, Chapter 282, so as to read as follows:

(h) In the event that the federal government claims title or interest in any such lake-bed lands, the same shall not be conveyed or otherwise disposed of, or preferential right therein accrue until such claim is settled, and the state land board hereby is authorized and empowered to enter into such agreements with the federal government affecting such lands as it deems best in the interest of the public, and make such deeds and conveyances to the United States of America in consideration of the issuance of such patents by the United States of America to the state of Oregon of such lands or lakes beds within the meander lines of any such lakes as said state land board of the state of Oregon and the federal government may mutually agree upon; provided, however, that nothing herein contained shall be construed as a recognition of any title or interest in the United States of America below or within the meander lines of any meandered lake to any lands or waters of any such lake prior to the execution and delivery of a deed or conveyance from the state of Oregon herein, and as provided for herein; and in carrying out such agreements the board may utilize the proceeds from

the sale of such lands, title or interest in which is claimed by the federal government; provided, that nothing herein contained shall be deemed to empower or authorize the state land board of Oregon or any other agency of the state to enter into any agreement which will divest any person or corporation of any water rights acquired under the laws of the state of Oregon or otherwise.

This Act was approved by the Governor and filed in the office of the Secretary of State, March 6, 1931, effective June 4, 1931, has never been modified, altered or repealed, and is still in full force and effect.

A Summary of Evidence Relating to Boats and Boating and Presented Upon the Issue of Navigability.

Boating.

Malheur Lake Division.

(Page references are to Joint Abstract of Record.)

All boats used are rowboats unless otherwise indicated.

Period of 1870-1880:

Capt. Bendire used boat in spring of 1875, and in June, 1876 for studies in ornothology (p. 751).

Period of 1880-1890:

Carey (p. 972); Loggan (pp. 972-973); Marshall (pp. 973-974); Brown (p. 975); each used a boat once; Martin went hunting in spring of 1888 in a boat (p. 974).

Period of 1890-1900:

Clark (p. 976); Elliott (pp. 976-978, during high water); Hembree (p. 981); Mrs. Fay Comegys (pp. 981-982, during real high water); each made one trip in a boat on Malheur Lake. Mrs. Effie L. Dunn used boat in 1894 during "extreme high water" to go to school (p. 975); Bunyard hunted in boat in spring and fall (pp. 978-979); Catterson used boat sometimes to cross channel at north end of Pelican Island, and one time went with another fellow in one (p. 979); Johnson used boat in 1892 and 1893 to hunt duck eggs; cut some hay one year, and hauled some in a boat (p. 979); Albertson used boat for hunting (p. 980); Ware one spring used a boat; Comegys went with fellow trapping in winter of 1894-1895; Reinemann never did much hunting in a boat (p. 982); Dunn used a boat to hunt duck eggs (p. 983); Culp one time hunted in a boat (p. 983).

Period of 1900-1910:

Hamilton went in boat through the Narrows into west end of Malheur Lake (p. 984); Mrs. Ollie Darsey hunted with her hsuband three times, the first in spring of 1907 (p. 984-986); Hembree used a boat on different occasions for hunting, principally sports (pp. 986-988); McGowan hunted several times in boat (pp. 988-990); Dr. Hibbard used a little folding canvas boat for 15 years; then used a wooden boat (pp. 990-991); Darsey was on Malheur Lake hunting mostly during period of 1902-1908, in a boat (pp. 991-993); Elliott used a boat (p. 993); Finley used a boat in 1908 in ornothology studies (pp. 994-995); Benson used a boat in 1909 for trapping (p. 985).

Period of 1910-1920:

Dr. Hibbard used a boat with an outboard motor between 1918 and 1924 or 1925 (p. 996); Heinz used a rowboat and motorboat for trapping, the latter between 1911 and 1918 (pp. 997-1998); Jewett went in a boat once to Cole Island (p. 999); Benson as warden use a rowboat and motor boat for patrolling purposes during high-water seasons (pp. 999-1002); Triska as warden used motor boat northeast of Springer's Spring in the springtime between 1915 and 1918 (pp. 1005-1006).

In General:

Howser used a boat once (p. 964); Gardner used a boat on several occasions in trapping (pp. 965-966); King used a boat once to hunt duck eggs (p. 966); Whiting used a flat-bottomed boat at one time (pp. 967-968); Witzel went in a flat-bottomed boat to Pelican Island (p. 969); Biggs went duck hunting on three occasions in flat-bottomed boat (p. 969);

Thompson went in a boat to Pelican Island once (p. 969); Sizemore went hunting in a boat (p. 970); Turner has been in a rowboat (p. 970).

The Narrows.

In General:

Elliott used a boat at the Narrows before the bridge was built to ferry people across it frequently (p. 1012); Bunyard hunted ducks there in a boat (p. 1012); Ware used a boat to cross the Narrows to go to school (p. 1013); Hembree used a boat for different purposes including hunting (p. 1013); Bollenbaugh used a boat (p. 1013); Mrs. Fay Comegys used a boat for pastime in spring and summer (p. 1014); Elliott used a boat (p. 1014); Venator went one-half mile east of Narrows in a boat (p. 1014); Triska went in a canoe once from the Narrows down to Harney Lake (pp. 1005-1006); McKinnon saw several boats there, but not east of the Narrows (p. 972).

Mud Lake.

Period of 1890-1900:

Elliott used flat-bottomed boats on this lake; about 1894-1895 he went down the channel in a boat about one-half mile from the Sand Reef during high water (pp. 1007-1008); Smith hunted duck eggs on Mud Lake once or twice, rowed toward the Narrows a few times, and from the Narrows towards Sodhouse spring to hunt grebes, and never has been in a boat below Mud Lake and east of Sand Reef (pp. 1008-1009); Ware used a boat to go to school, and hunted ducks (pp. 1009-1010); Dr. Hibbard in 1899 a high-water year was on Mud Lake in a boat, going as far as he could in the channel towards Harney Lake, but did not get within several miles of it (pp. 1010-1011).

Period of 1900-1931:

Hamilton used a small flat-bottomed boat in 1905-1906 (p. 1011); Dillman made one or two trips on Mud Lake (pp. 1011-1012); Elliott experimented with homemade boats on Mud Lake mostly, making a trip once west from Mud Lake in spring of year (p. 1012).

In General:

Dunn used a little flat-bottomed boat to hunt with on Mud Lake (p. 1007).

Harney Lake.

Bollenbaugh used a homemade boat once on this lake, but did not row across it (pp. 1002-1003); Dr. Hibbard was on the lake in a boat from time to time (p. 1003).

Natural Impediments to Boating on the Lakes.

(1) Malheur Lake.

Shallow Water:

Gardner (pp. 965-966); Sizemore (p. 970); Howser (p. 964); Bunyard (pp. 978-979); Alberson (p. 980); Mrs. Fay Comegys (pp. 981-982); Comegys (p. 982); Hamilton (p. 984); Mrs. Ollie Darsey (pp. 984-986); McGowan (pp. 988-990); Darsey (pp. 991-993); Dr. Hibbard (p. 996); Heinz (pp. 997-998); Benson (pp. 999-1002); Triska (pp. 1005-1006).

Mud:

Carey (p. 972); Brown (p. 975); Culp (p. 983); Heinz (pp. 997-998); Benson (pp. 999-1002).

Tules:

Dr. Hibbard (p. 970); Whiting (pp. 967-968); Loggan (pp. 972-974); Clark (p. 976); Elliott (pp. 976-979); Hembree (p. 981); Mrs. Fay Comegys (pp. 981-

982); Reinemann (p. 982); Dunn (p. 983); Culp (p. 983); Hamilton (p. 984); Hembree (pp. 986-988); McGowan (pp. 988-990); Darsey (pp. 991-993); Finley (pp. 994-995); Heinz (pp. 997-998).

Aqueous Plants:

Dr. Hibbard (pp. 990-991); Heinz (pp. 997-998).

The Narrows.

Shallow Water:

Bunyard, "a boat" could be used in Spring of year in high-water, but not necessary to have boat in fall (pp. 1012-1013); Mrs. Fay Comegys, "no water in fall" with which to operate boat (p. 1014).

Mud Lake.

Tules and Grasses:

Dunn (p. 1007); Hamilton (p. 1011); Dillman (pp. 1011-1012); Elliott (p. 1012).

Shallow Water:

Elliott (pp. 1007-1008); Ware (pp. 1009-1010); Hamilton (p. 1011); Dunn had to put boat in slough to get into lake, otherwise had to drag it through tules (p. 1007); Elliott encountered shallow water in tules (p. 1012).

No Commerce Aspects.

Gardner, "In all my experience in this community (since 1883, p. 34) I never have heard of anyone using these lakes to freight on. It is not practical to use it for that." (p. 1004); Caldwell (settled in Harney Valley) in 1879 (p. 16), never saw any boat on Malheur Lake bringing supplies (p. 1004).